NITED STATES DISTRICT COURT
OUTHERN DISTRICT OF NEW YORK

UDITH CLARK, et al.,

Plaintiffs,

- against -

NITED STATES OF AMERICA, et al.,

Defendants.

AMENDED
PROTECTIVE ORDER

78 Civ. 2244 (MEL)

Plaintiffs having moved this Court for an order to tect the discovery process and to further the interests of tice, and the Court having duly considered the matter, it : ORDERED that:

1. No document identifiable with any plaintiff in the possession, custody or control of the individual defendants or Government agency defendants shall be destroyed or obliterated in any manner pending a final determination of this action, including any appeals, or upon further order of this Court:

2(a). All documents referred to in, and protected by t s order shall be placed and maintained under supervisory cont: l of the Court in the physical custody of any person or agency now in possession of such records who shall be responsible for the physical integrity of the documents. Any defendant which has in its possession any of the documents shall be bound by its terms.

3(a). A copy of this order shall be circulated to each field office and legal attaches of the Federal Bureau of Investigation ("FBI") as well as any organizational unit within the headquarters of the FBI. Additionally, copies of the order will be circulated to appropriate officials of the Postal Service and Department of Justice having custody of documents identifiable to any plaintiff.

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SEC. 2

Greenberg/Gray-2261

(b). A copy of this order shall be placed in each volume or section of all FBI main files identifiable as relating to plaintiffs.

(c). The FBI shall prepare an index of all main files referred to in 3(b) above, specifying the serial numbers of documents contained in each file and the location of each file. A copy of the index shall be furnished to ~~plaintiffs~~' attorneys for each party and to the Court.

4. Documents protected by this order include (a) all records of any kind and description which have been garnered in connection with past and present investigations and may be garnered in connection with future investigations of any plaintiff, including but not limited to records which are identifiable to plaintiffs though contained in records pertaining to investigations of organizations or individuals with which any plaintiff may have had or may have affiliations, and (b) directives or guidelines governing the conduct of such investigations, including but not limited to the FBI Manual of Instructions and Attorney General Guidelines.

5. All documents compiled in the course of the prosecution or defense of United States v. Gray and United States v. Felt and Miller, 78-000179 (Bryant, C.J.), excluding attorneys' work products, shall be subject to the provisions of paragraphs 1 and 2 of this order. At the conclusion of the prosecutions, all documents covered by this order shall be maintained in the custody of attorneys, or their successors in control of such documents pending final determination of this action.

6. Nothing in this order shall preclude the handling, necessary marking of documents, or necessary alteration of copies of documents in the ordinary course of business or trial preparation by anyone in possession of the documents.

7. It is the intent of the Court that this order shall be broadly construed so as to prevent the destruction of any documents. In the event of any question by defendants concerning the scope and coverage of this order, or any question concerning whether any particular documents come within the designated scope and coverage of this order, the documents in question will not be destroyed or obliterated in whole or part, until either: (a) they are presented to the attorneys for the other parties ~~plaintiffs and plaintiffs' attorneys~~ for examination and such parties, ~~plaintiffs,~~ by their attorneys, stipulate in writing that the documents may be destroyed or obliterated in whole or part; or (b) the Court, after a hearing duly noticed, exempts the specified documents in question from its order.

8. In addition to specific instructions concerning communication of the contents of this order contained herein, defendants and their attorneys shall communicate the contents of this order forthwith to all appropriate individuals so as to asure the effectuation and compliance with the order by all persons.

9. Within 30 days, defendants shall report to the Court all steps taken so as to assure the effectuation and compliance with this order by all persons.

Dated: New York, New York

~~April 16~~ May 16, 1979

Robert L. Carter
United States District Judge

UNITED STATES GOVERNMENT

Memorandum

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

Assoc. Dir. _____
Dep. AD Adm. _____
Dep. AD Inv. _____
Asst. Dir.:
Adm. Servs. _____
Crim. Inv. _____
Ident. _____
Intell. _____
Laboratory _____
Legal Coun. _____
Plan. & Insp. _____
Rec. Mgnt. _____
Tech. Servs. _____
Training _____
Public Affs. Off. _____
Telephone Rm. _____
Director's Sec'y _____

TO : Mr. Bassett

DATE: 6-20-78

FROM : P. V. Daly

SUBJECT: RESPONSE TO DEFENSE REQUEST FOR DISCOVERY IN U. S. v. L. PATRICK GRAY III, ET AL

PURPOSE: To acknowledge that the following Research Analysts, all permanently assigned in Records Management Division, reported on temporary assignment on June 12, 1978:

[redacted]

b6
b7C

RECOMMENDATION: None, for information.

APPROVED:

Director _____
Assoc. Dir. _____
Dep. AD Adm. _____
Dep. AD Inv. _____
Adm. Serv. _____
Crim. Inv. _____
Ident. _____
Intell. _____
Laboratory _____
Legal Coun. _____
Plan. & Insp. _____
Rec Mgnt. _____
Tech. Servs. _____
Training _____
Public Affs. Off. _____

REC-110

62-116045-37

Greenberg/Gray-2264

1 - Finance and Personnel
1 - Mr. Bassett
1 - Mr. Daly

JLT:dmd
(4)

14 AUG 31 1978

8 4 SEP 14 1978

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

FBI/DOJ

OFFICE OF THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D.C. 20530

31 MAY 1978

Assoc. Dir.
Dep. AD Adm.
Dep. AD Inv.
Asst. Dir.:
Adm. Serv.
Crim. Inv.
Ident.
Intell.
Laboratory
Legal Coun.
Plan. & Insp.
Rec. Mgnt.
Tech. Servs.
Training
Public Affs. Off.
Telephone Rm.
Director's Sec'y

TO: The Director
Federal Bureau of Investigation

FROM: Benjamin R. Civiletti
Deputy Attorney General

SUBJECT: Safeguarding National Security Information
(Surreptitious Entry Investigation).

In response to your memorandum of May 9, 1978, I am advised that the prosecution team of the Criminal Division and the discovery team established by the FBI have now worked out a satisfactory system for reviewing documents related to the Gray, Felt, Miller prosecution to ensure that memos are properly classified prior to any release outside the Department. Documents compiled by the Long Task Force which are not of potential use to the prosecution team are stored in the JEH Building and any review prior to release in discovery will be made by Bureau personnel. Documents retained in the Criminal Division are also being reviewed by Special Agent [redacted] of the discovery team prior to any release.

b6
b7C

I understand that there was some confusion at the outset of discovery and that four documents were inadvertently released without review for classification. The Department's security staff arranged for the retrieval of these documents from defense attorneys and is securing inadvertent release forms from the defense attorneys. These documents have been turned over to the discovery team for classifieation review.

I am satisfied that adequate measures have now been taken to protect sensitive materials related to this prosecution and attendant discovery. If you have additional concerns regarding the security of these materials, I will be happy to discuss them with you.

FEC-110 62-118045-38

14 AUG 31 1978

CLOSURE

Encl. to informal
note to Mr. Adams
from H.N. Bassett

4-PVD

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6-15-78

Greenberg/Gray-2265

b6
b7C

DO-7

OM

OFFICE OF DIRECTOR, FEDERAL BUREAU OF INVESTIGATION

TO

OFFICIAL INDICATED BELOW

MR. ADAMS (✓)
MR. MCDERMOTT ( )
MR. BASSETT ( )
MR. COCHRAN ( )
MR. COLWELL ( )
MR. CREGAR ( )
MR. JOSEPH ( )
MR. KELLEHER ( )
MR. KENT ( )
MR. LONG ( )
MR. MINTZ ( )
MR. MOORE ( )
MR. BOYNTON ( )
MR. COLEMAN ( )
MR. BRUEMMER ( )
TELE. ROOM ( )
MISS DEVINE ( )
( )
( )
( )

SEE ME (✓)
NOTE AND RETURN ( )
PREPARE REPLY ( )
SEND MEMO TO ATTORNEY GENERAL ( )
FOR YOUR RECOMMENDATION ( )
WHAT ARE THE FACTS? ( )
HOLD ( )

REMARKS: How does this tie in with to A&L?

Informal note to Mr. Adams
from H. N. Bassett 6-15-78

HNB/jmr

FBI/DOJ

62-118045-38

ENCLOSURE

FEDERAL GOVERNMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	*	
v.	*	Crim. No. 78-000179
L. PATRICK GRAY, III W. MARK FELT and EDWARD S. MILLER	*	

* * * * *

MOTION FOR DISCOVERY AND INSPECTION
ON BEHALF OF THE DEFENDANT GRAY

PREFATORY STATEMENT

Counsel for the Government and for Mr. Gray have engaged in substantial informal negotiations to resolve discovery issues in advance of filing motions. Numerous issues have been resolved in this manner and are, therefore, not raised by way of formal motion. The discovery requests which are contained herein represent requests which either in whole or in part the parties have been unable to resolve informally to date. Further negotiations are contemplated in a continuing effort to resolve any dispute. Counsel will advise the Court immediately if any additional discovery issues are resolved informally. 62-116045-

NOT RECORDED
14 AUG 31 1979

L. Patrick Gray, III, by his attorneys, respectfully moves this Court to enter an Order:

I. Documents and Other Information Discoverable as Brady Material

1. Requiring the Government prosecutor at this time to advise counsel for the defendant Gray of any and all information, from whatever source acquired, tending to exculpate the defendant of the offense charged in the indictment.

2. Requiring the Government prosecutor at this time to state whether any person whom the Government intends to call as a

8 4 SEP 14 1978

witness was or is under investigation or indictment, or was or is subject to disciplinary action by an agency of the United States for any offense against the United States or of any state, or for violation of any rule or regulation of an agency of the United States. If the answer is in the affirmative, to disclose (a) the name and address of each such witness; (b) the details and circumstances of each investigation and/or indictment and/or disciplinary action; (c) as to any such investigation, indictment or disciplinary action, the details and circumstances of all promises or representations made by either the prosecutors or investigators in this case to each such witness or person acting on behalf of such witness.

4. Requiring the Government prosecutor to disclose at this time the names and addresses of each person questioned by the Government who will not be called as a witness, together with any statements by such persons in the Government's possession, custody or control.

5. Requiring the Government prosecutor at this time to disclose the nature and substance of all promises, inducements or rewards given by the Government to any person whom it intends to call as a witness.

6. Requiring the Government prosecutor to make available to defendant's counsel all books, records, recordings, notes, documents, papers, photographs or other tangible objects in the Government's possession, custody or control reflecting efforts taken during Mr. Gray's tenure to ensure that the F.B.I. operated within the confines of the Keith decision.

II. Documents and Other Information Discoverable as Jencks Material

7. Requiring the Government prosecutor at this time to disclose the names and last known addresses of all witnesses whom

the Government intends to call to testify at the trial of this case, together with any statements by such witnesses in the Government's possession, custody or control.

8. Requiring the Government prosecutor at this time to make available to defendant's counsel all books, records, recordings, notes, documents, papers, photographs or other tangible objects in the Government's possession, custody or control which reveal the content of the conversation alleged to have taken place in August, 1972, between Mr. Gray and Mr. Miller, as set forth in the first overt act of the indictment.

9. Requiring the Government prosecutor at this time to make available to defendant's counsel all books, records, recordings, notes, documents, papers, photographs or other tangible objects in the Government's possession, custody or control which reveal the content of the statement allegedly made by Mr. Gray on September 12, 1972, as set forth in the second overt act in the indictment.

10. Requiring the Government prosecutor at this time to make available to defendant's counsel all written statements and the substance of all oral statements in the Government's possession, custody or control made by any other co-conspirators during the course of the conspiracy which the Government intends to offer in evidence at trial against this defendant.

11. Requiring the Government prosecutor at this time to make available to defendant's counsel all written statements and the substance of all oral statements in the Government's possession, custody or control made prior to or after the conspiracy by co-defendants which the Government intends to offer in evidence at trial.

III. Documents and Other Information Material to Defendant's Preparation of His Defense That the Allegedly Wrongful Activity Was Undertaken Without His Knowledge or Authority

12. Requiring the Government prosecutor at this time to make available to defendant's counsel all documents, books, papers, records, recordings, notes, photographs or other tangible objects in the Government's possession, custody or control which reflect that F.B.I. agents engaged in warrantless surveillance techniques from the period January 1, 1960 to the present.

13. Requiring the Government prosecutor at this time to make available to defendant's counsel all documents, books, papers, records, recordings, notes, photographs or other tangible objects in the Government's possession, custody or control which reflect in any way that the defendant Gray was consulted, made aware of, gave specific approval to, or was advised of any of the "surreptitious entries" set forth as overt acts in the indictment by defendants, Felt, Miller, or any F.B.I. personnel during Mr. Gray's tenure as Acting Director of the F.B.I.

14. Requiring the Government prosecutor at this time to make available to defendant's counsel all documents, books, papers, records, recordings, notes, photographs or other tangible objects in the Government's possession, custody or control which reflect in any way that defendant Gray was advised of or made aware of any of the memoranda, communications, or conversations described in overt acts 6 through 32 of the indictment by defendants, Felt, Miller, or any F.B.I. personnel during Mr. Gray's tenure as Acting Director of the F.B.I.

15. Requiring the Government prosecutor to make available to defendant's counsel all F.B.I. documents in the Government's possession, custody or control marked either "June" and/or "Do Not File" from the period January 1, 1960 to the present.

16. Requiring the Government prosecutor to make available to defendant's counsel all F.B.I. Headquarters Inspection Division reports and inspector's worksheets of inspections conducted by the F.B.I. Headquarters Inspection Division of the New York Field Office, the Washington Field Office, and any other field office in the Government's possession, custody or control in which the Weatherman Organization, or any member thereof, was the subject of an investigation, or in which efforts of any kind were made by special agents of the F.B.I. to locate and apprehend fugitive members of the Weatherman Organization.

17. Requiring the Government prosecutor to make available to defendant's counsel all books, papers, records, recordings, notes, documents, photographs or other tangible objects in the Government's possession, custody or control which reflect in any way that the House and Senate Intelligence Commitees and the General Accounting Office were misled by representatives of any government agency concerning the nature and extent of surreptitious entries by agents of the Federal Bureau of Investigation.

18. Requiring the Government prosecutor to make availalbe to defendant's counsel all books, records, recordings, notes, documents, papers, photographs or other tangible objects in the Government's possession, custody or control which reflect contact between the President's Foreign Intelligence Advisory Board, or members of the Board staff, and the F.B.I., particularly the Domestic Intelligence Division of the F.B.I. during Mr. Gray's tenure in office.

IV. Documents and Other Information Material to Defendant's Preparation of His Defense That the Indictment is Subject to Dismissal for Improper Selective Prosecution by the Government

19. Requiring the Government prosecutor to make available to defendant's counsel all communications in the Government's possession, custody or control from F.B.I. headquarters to the Department of Justice or other Government agencies prepared from 1960 through 1974 which reveal, either directly or by interpretation of F.B.I. code symbols or other nomenclature, that special agents of the F.B.I. conducted surreptitious entries without a warrant.

20. Requiring the Government prosecutor to make available to defendant's counsel all books, documents, papers, records, recordings, notes, photographs or other tangible objects in the Government's possession, custody or control, which reflect that any person or persons in the Department of Justice, other than members of the F.B.I., were aware of the use of warrantless surveillance techniques by the F.B.I. from the period January 1, 1960 to the present.

21. Requiring the Government prosecutor to make available to defendant's counsel all prosecutive reports from F.B.I. agents to federal prosecutors prepared during the period January 1, 1960 to the present which reflect that F.B.I. agents engaged in warrantless surveillance techniques.

22. Requiring the Government prosecutor to make available to defendant's counsel a list of all matters or cases from 1950 to the present in which allegations or indications of violations of the Fourth Amendment by law enforcement officers came to the attention of the Department of Justice.

23. Requiring the Government prosecutor to make available to defendant's counsel a list of all investigations conducted by the F.B.I. from 1950 to the present for possible violations of the Fourth Amendment by law enforcement officers.

24. In those investigations referred to above in which a determination not to prosecute was made by the Department of Justice, requiring the Government prosecutor to make available to defendant's counsel all documents showing the basis for such determination.

25. Requiring the Government prosecutor to make available to defendant's counsel all books, papers, documents, records, recordings, notes, photographs or other tangible objects in the Government's possession, custody or control which reflect in any way that any government agency other than the Federal Bureau of Investigation engaged in undercover penetration and/or surreptitious entries of premises frequented or believed to be frequented by members of the Weatherman Organization and/or friends or sympathizers of that organization, including, but not limited to, all such documents relating to the so-called "Chaos" program conducted by the Central Intelligence Agency from January 1, 1960 to the present.

V. Documents and Other Information Material to Defendant's Preparation of His Possible Defense That the Allegedly Wrongful Activity was Authorized by Higher Authority

26. If, during the period January, 1960 to the present, the President of the United States, the Attorney General of the United States, the Director of the F.B.I. or their agents authorized (a) warrantless wire interceptions of persons believed to be members of the Weatherman Organization; or (b) the planting and/or retrieval of microphones on premises believed to be occupied by members of the Weatherman Organization without a warrant; or (c) warrantless surreptitious entries on premises believed to be occupied by members of the Weatherman Organization or their sympathizers, requiring the Government prosecutor to make available to defendant's counsel all books, records, recordings, notes, documents, papers, photographs or other tangible objects in the Government's possession, custody or control which reflect such authorization.

27. If, during the period January, 1960 to the present, the President of the United States, the Attorney General of the United States, the Director of the F.B.I. or their agents ever withdrew authority for (a) warrantless wire interceptions of persons believed to be members of the Weatherman Organization; (b) the planting and/or retrieval of microphones on premises believed to be occupied by members of the Weatherman Organization without a warrant; or (c) warrantless surreptitious entries on premises believed to be occupied by members of the Weatherman Organization or their sympathizers, requiring the Government prosecutor to make available to defendant's counsel all books, records, recordings, notes, documents, papers, photographs or other tangible objects in the Government's possession, custody or control which reflect withdrawal of such authorization.

28. If the President of the United States, the Attorney General of the United States, the Director of the F.B.I. or their agents ever authorized the F.B.I. to use surreptitious entries without a warrant to install and/or retrieve microphones without a warrant; to install wiretaps without a warrant; or to open mail without a warrant, as investigative techniques, requiring the Government's prosecutor to make available to defendant's counsel all books, records, recordings, notes, documents, papers, photographs, or other tangible objects in the Government's possession, custody or control which reflect the authorization to use such investigative techniques.

29. If the President of the United States, the Attorney General of the United States, the Director of the F.B.I. or their agents ever withdrew authority from the F.B.I. to use surreptitious entries without a warrant; to install and/or retrieve microphones without a warrant; to install wiretaps without a warrant; or to open mail without a warrant, as investigative techniques, requiring

the Government prosecutor to make available to defendant's counsel all books, records, recordings, notes, documents, papers, photographs, or other tangible objects in the Government's possession, custody or control which reflect withdrawal of the authorization to use such investigative techniques.

30. Requiring the Government prosecutor to make available to defendant's counsel all books, papers, records, recordings, notes, documents, photographs or other tangible objects in the possession, custody or control of the Government, which pertain to the creation and function of the Cabinet Comittee on Terrorism and any contact between that Committee and any representative of the F.B.I., including but not limited to the defendant, Gray.

31. Requiring the Government prosecutor to make available to defendant's counsel all documents and memoranda in the Government's possession, custody or control, prepared by the White House, Department of Defense, CIA, Department of Treasury, Department of State, NSA, Department of Justice, and the F.B.I. concerning plans to deal with the Weatherman Underground Organization and other terrorist groups from 1969 through 1974, including but not limited to, the so-called "Huston Report" in 1970 or 1971.

32. Requiring the Government prosecutor to make available to defendant's counsel all documents in the Government's possession, custody or control, showing communication between the White House and the Department of Justice, and the White House and the F.B.I., concerning plans and investigative methods to deal with the Weatherman Organization and other terrorist groups from 1969 through 1974, including but not limited to: a memorandum prepared in the early 1970s by Mr. Robert Haynes, F.B.I. liaison to the White House, which related a conversation with Mr. Egil Krogh, the substance of which was that Mr. Krogh stated that President Nixon wanted the F.B.I. to use all means possible to stop terrorist activities.

33. Requiring the Government prosecutor to make available to defendant's counsel those portions of all tapes and transcripts of White House conversations in the Government's possession, custody or control in which the Weatherman Underground Organization and/or other terrorist groups were discussed, during the period from January 20, 1969 through May 31, 1973.

34. Requiring the Government prosecutor to make available to defendant's counsel all documents, including reports and statements of persons interviewed, in the Government's possession, custody or control, which indicate that there was an absence of approval by authorities higher than these defendants of the surreptitious entries alleged in the indictment, or that said higher authorities disapproved such surreptitious entries.

35. Requiring the Government prosecutor to make available to defendant's counsel all documents in the Government's possession, custody or control showing whether or not the President of the United States or the Attorney General authorized the "Al Fatah" surreptitious entry or entries in September, 1972.

36. Requiring the Government prosecutor at this time to make available to defendant's counsel any and all documents, books, papers, records, recordings, notes, photographs or other tangible objects in the Government's possession, custody or control which reflect in any way that the President of the United States and/or the Attorney General of the United States and/or their representative were advised that the F.B.I. investigation of the Weatherman Underground would include surreptitious entries.

37. Requiring the Government prosecutor at this time to make available to defendant's counsel any and all documents, books, papers, records, recordings, notes, photographs or other tangible objects in the Government's possession, custody or control which reflect in any way that Congressional Committees investigating the

Weatherman Underground's bombing of the U.S.Capitol were told that surreptitious entries had occurred or would take place in the future.

38. Requiring the Government prosecutor to make available to defendant's counsel all orders, directives, policy statements, or guidelines issued to or by the F.B.I., in the Government's possession, custody or control, effective from 1950 to the present, regarding investigative procedures to be followed in matters involving the national security or internal security of the United States including the installation of electronic surveillance and entries into homes, apartments, or other places.

39. Requiring the Government prosecutor to make available to defendant's counsel all books, papers, records, recordings, notes, documents, photographs or other tangible objects in the Government's possession, custody or control which reflect that F.B.I. agents received incentive awards for conducting surreptitious entries from January 1, 1960 to the present.

VI. Documents and Other Information Material to Defendant's Preparation of His Defense that the Allegedly Unlawful Activity was Conducted in Response to a Threat to the National Security Which Justified the Use of Surreptitious Entries Without Warrants

40. Requiring the Government prosecutor to make available to defendant's counsel all documents prepared by a joint Department of Justice/F.B.I. committee known as the "Department Review Committee" in the Government's possession, custody or control, which reflect that on or about April 8, 1976 and again on or about August 31, 1976, said Committee designated the Weatherman investigation as a national security matter.

41. Requiring the Government prosecutor to make available to defendant's counsel all books, papers, records, recordings, documents, notes, photographs or other tangible objects in the possession, custody or control of the Government which directly or indirectly reflect involvement or colloboration by the Weatherman

Organization or its members with any foreign power, or with any agent of a foreign power.

42. Requiring the Government prosecutor to make available to defendant's counsel all books, papers, records, recordings, documents, notes, photographs or other tangible objects in the possession, custody or control of the Government which reflect that the Weatherman Underground Organization was ever classified by any government agency or committee as a national security threat or a threat to the internal security of the United States.

43. Requiring the Government prosecutor to make available to defendant's counsel all books, papers, records, recordings, documents, notes, photographs or other tangible objects in the possession of the Department of Justice, the F.B.I., the DID, CIA, NSA, Department of Treasury, and State Department which show that members of the Weatherman Underground Organization had connections with foreign countries, traveled to or from foreign countries, sent or received communications to or from foreign countrie or received financial or other assistance from foreign countries. Such documents include but are not limited to pertinent documents from the following sources:

a. The so-called "Chicago Report"; more specifically, a report compiled by the Chicago office of the F.B.I. detailing the relationship of members of the Weatherman Organization and foreign governments or agents.

b. Any electronic surveillance which discloses the information requested in this paragraph including electronic surveillance of one William Ayres, a Weatherman member, which indicates contact with the government of North Vietnam.

c. Internal documents of the Weatherman Organization including all copies in the possession of the Government of the publication "Osawatomie," the Weatherman periodical.

d. Any and all reports of foreign law enforcement or governmental agencies including but not limited to the Royal Canadian Mounted Police.

e. Documents in F.B.I. files showing communications between the Weatherman Organization, SDS, the "Venceremos Brigade", and the Cuban Mission to the United Nations.

f. Pertinent documents from F.B.I. files designated as "109-12" (foreign political matters) and all subfiles thereunder.

g. Pertinent documents from F.B.I. files designated as "66-1686" (the "June" file).

h. Pertinent documents from F.B.I. files described as "Foreign Influence in the New Left" and all subfiles thereunder.

i. All pertinent information obtained from surrendered or apprehended Weatherman fugitives showing foreign connections or influence.

VII. Documents and Other Information Material to Defendant's Preparation of His Defense That the Indictment is Subject to Dismissal for Improper Conduct by the Government in Connection With the Grand Jury Proceedings

44. Requiring the Government prosecutor to disclose to defendant's counsel the date of convening of each grand jury considering proceedings against the defendants in this case, or any of them, in the United States District Court for the Southern District of New York or the United States District Court for the District of Columbia or elsewhere; the date of the first issuance of a subpoena duces tecum by each such grand jury; the date of the first issuance of a subpoena for testimony by each such grand jury; the date of the first receipt of documents by each such grand jury; the date of dissolution of each such grand jury; and identical

information relating to the grand jury returning the indictment in this matter.

45. Requiring the Government prosecutor to make available to defendant's counsel all petitions, motions and orders of court relating to the convening and/or discharge of any of the aforesaid grand juries.

46. Requiring the Government prosecutor to make available to defendant's counsel a listing of all materials subpoenaed by each such grand jury and all witness testimony taken by each such grand jury and a statement as to which of these documents and what of this testimony was submitted to each subsequent grand jury, including each reference by any prosecutor to any such document(s) or testimony.

47. Requiring the Government prosecutor to produce all documents reflecting authorization for Mr. Skolnik to sign the indictment returned in this case.

VII. Documents and Other Information Material to Defendant's Preparation of His Defense That the Indictment is Subject To Dismissal Due to Prejudicial Pre-Indictment Delay

48. Reference the Attorney General's press release of 4/10/78 which stated (page 2): "In the course of the investigation, evidence was developed which indicated that the FBI, and perhaps one or more Justice Department attorneys, failed to make full disclosure of surreptitious entries. . . ." Requiring the Government prosecutor to disclose to defendant's counsel the names and positions of the attorneys referred to, and disclose the evidence referred to, insofar as it shows knowledge of the surreptitious entries by any Department of Justice attorneys prior to 1976. This request includes but is not limited to documentary evidence and statements of witnesses interviewed.

49. Requiring the Government prosecutor to make available to defendant's counsel a list of all records, documents, files, statements and other relevant evidentiary materials which the Government knows or has reason to know have been destroyed or lost since the time the Government first became aware of the alleged facts resulting in this indictment.

50. Requiring the Government prosecutor to make available to defendant's counsel a list of all persons having information relevant and material to the charges herein who have either died or whose whereabouts are no longer known to the Government, since the Government became aware of the facts resulting in this indictment.

IX. Documents and Other Information Material to Defendant's Preparation of His Defense That the Indictment is Subject to Dismissal for Improper Pre-Trial Publicity Emanating From Officials of the Department of Justice

51. Requiring the Government prosecutor to make available to defendant's counsel all press releases, speeches, interviews, public statements, or transcripts or recordings of public statements, formal or informal by the Attorney General of the United States, the Chief of the Criminal Section of the Civil Rights Division or other representatives of the Department of Justice in the Government's possession, custody or control, relating in any way to the investigation or indictment of the defendant.

52. Requiring the Government prosecutor to make available to defendant's counsel all records and notations of meetings or personal or telephone conversations with media representatives by the Attorney General of the United States or personnel of the Department of Justice in the Government's possession, custody or control, relating in any way to the investigation or indictment of the defendant.

53. Requiring the Government prosecutor to make available to defendant's counsel all press releases, public statements and

communications to Congressional Committees issued at any time by the United States Attorneys for the District of Columbia or the Southern District of New York, or the Department of Justice, in the Government's possession, custody or control, relating in any way to investigations of illegal break-ins by the Federal Bureau of Investigation generated since January 1, 1973.

54. Requiring the Government prosecutor to identify to defendant's counsel the time, place, participants, nature, occasion, and substance of each statement to or in the presence of any press, ratio, or television representative concerning the investigation or indictment of the defendant, by the Attorney General of the United States, by any representative of the United States Attorney's Office in New York or Washington, the Department of Justice or any employee thereof, to the extent that this information is not disclosed by documents produced pursuant to paragraph 53 above.

55. Requiring the Government prosecutor to make available to defendant's counsel all Justice Department memoranda in the Government's possession, custody or control, relating in any way to pre-trial publicity in connection with the investigation or indictment of defendant and identification of the time, place, participants nature, reason and substance of each verbal communication or instruction within the Justice Department relating to pre-trial publicity in connection with this investigation and indictment, including all communications between the Department and present and former counsel associated with the investigation, including William L. Gardner, Stephen Horn, and Richard F. Johnston, relating to volunteered public statements concerning the investigation and indictments.

56. Requiring the Government prosecutor to make available to defendant's counsel those portions of the grand jury minutes reflecting questioning of witnesses by grand jurors or comments by grand jurors.

57. Requiring the Government prosecutor to make available to defendant's counsel all press clippings relating to the investigation and indictment of defendant systematically maintained by or in the possession of the Department of Justice.

Respectfully submitted,

Alan I. Baron

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Attorneys for Defendant,
L. Patrick Gray, III

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Discovery and Inspection on Behalf of the Defendant Gray and Memorand in Support thereof was hand-delivered this 22nd day of May, 1978 to Barnet D. Skolnik, Esquire, Department of Justice, Washington, D.C.; and to Brian Gettings, Esquire, 1700 Pennsylvania Avenue, N.W., Washington, D.C.; and to Thomas A. Kennelly, Esquire, 1000 Connecti Avenue, N.W., Washington, D.C.

Alan I. Baron

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA)
v.)
L. PATRICK GRAY, III,)
W. MARK FELT,)
and)
EDWARD S. MILLER)

CRIMINAL NO. 78-00179

MOTION FOR DISCOVERY AND INSPECTION
ON BEHALF OF DEFENDANT W. MARK FELT

COMES NOW the defendant, W. MARK FELT, by counsel, and moves this Honorable Court for an Order, pursuant to Rule 16, Federal Rules of Criminal Procedure, permitting him to inspect and copy specific records and other documentary materials which are designated hereinafter.

Where used, the term "documentary materials" means all books, papers, documents, records, letters, memoranda, photographs, criminal records, tape recordings, or other tangible objects in the possession, custody or control of any government agency, including but not limited to the White House, G.S.A., the Justice Department, the F.B.I., the C.I.A., the State Department, the Treasury Department, the Secret Service, the Defense Department and the N.S.A.

The grounds for and points and authorities in support of this Motion are set forth in an attached memorandum which, where appropriate, also sets forth the relevance and materiality of the materials sought and our entitlement to them.

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A. General

1. Any relevant[1/] written or recorded statements made by the defendant W. Mark Felt, including documentary material

1/ The word "relevant" as used herein means relating to the following subjects: intelligence programs, domestic and foreign; terrorist activities, domestic and foreign; the Weatherman Organization; the use of any investigative techniques in intelligence programs, or investigations into terrorist activities and the Weatherman Organization, and; the use of any investigative technique in any other investigations and programs involving, for example, fugitives or organized crime

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authorized by or for him between 1942 and 1973 and made and maintained by the Justice Department and the F.B.I. in the ordinary course of business..

2. Any relevant written or recorded statements made by alleged co-conspirators, L. Patrick Gray and Edward S. Miller, including documentary material authorized by or for them between 1942 and 1973 and made and maintained or received by the Justice Department and the F.B.I. in the ordinary course of business.

3. Any relevant written or recorded statements made by any other alleged co-conspirator, including documentary material authorized by or for them between 1942 and 1973 and made and maintained or received by the Justice Department and the F.B.I. in the ordinary course of business.

4. Any relevant written or recorded statements made by any other person between 1942 and 1973 and made and maintained or received by the Justice Department and the F.B.I. in the ordinary course of business which was seen by, routed to, disseminated to or the contents or existence of which would normally have been known to the defendant W. Mark Felt.

5. The substance of any oral statement which the government intends to offer in evidence at the trial made by defendant W. Mark Felt in response to interrogation by any person then known to Mr. Felt to be a government agent.

6. Documentary materials which are intended for use by the government as evidence in chief at trial or which were obtained from or belong to defendant W. Mark Felt.

7. The results or reports of any scientific tests or experiments conducted during the investigation which led to this indictment and prosecution.

8. Documentary materials or the substance of any oral statement relating to any electronic surveillance[2/] employed by the

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2/ Within the meaning of 18 U.S.C. 2510, et. seq.

government during the investigation which led to this indictment and prosecution.

9. The fruits of any searches and seizures conducted by the government during the investigation which led to this indictment and prosecution, together with all warrants and affidavits in support thereof, including but not limited to items seized from F.B.I. offices in Washington, D. C., and New York, N. Y., on August 19, 1976.

10. Documentary materials made and maintained or received by the Justice Department and the F.B.I. in the ordinary course of business concerning all Weatherman fugitives referred to in paragraph 5 of the indictment including arrest warrants and supporting affidavits thereof.

11. Documentary materials made and maintained or received by the Justice Department and the F.B.I. in the ordinary course of business relating to overt acts 1 through 5 of the indictment.

12. Documentary materials made and maintained or received by the Justice Department and the F.B.I. in the ordinary course of business relating to Jennifer Dohrn, Judith Clark, Susan Roth, Frances Shreiberg, Mr. and Mrs. Benjamin Cohen, Mortimer Bookehin and Leonard Machtinger, named in paragraph 6 of the indictment as citizens of the United States, relatives and acquaintances of Weatherman fugitives and also named, variously, in overt acts 6 through 32 of the indictment.

13. Documentary materials made and maintained or received by the Justice Department and the F.B.I. in the ordinary course of business which reflect the names, last known address and dates of service in the position of all persons serving as Assistant Directors and above within the F.B.I. from 1942 to the present.

14. Documentary materials reflecting conversations among the President of the United States and any member of his staff or between the President of the United States or any member of his staff and any member of the Executive or Legislative Branch of

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the Government relating to terrorist activities in general and the Weatherman Organization in particular between 1964 and the present.

B. Witnesses

1. The names and addresses of all "others to the grand jury known" with whom the defendant W. Mark Felt is alleged to have conspired, together with any statements by such persons in the government's possession, custody or control.

2. The names and addresses of all persons whom the governmen intends to call as witnesses, together with any statements by such witnesses in the government's possession, custody or control

3. The names and addresses of all persons interviewed or questioned by the government during the investigation which led to this indictment and prosecution and whom the government, at this time, does not intend to call as witnesses, together with any statements by such persons in the government's possession, custody or control.

4. Documentary materials relating to or the substance of any oral statements containing promises, inducements or rewards given by the government to any persons whom it intends to call as a witness or who was interviewed or questioned by the government during the investigation which led to this indictment and prosecution.

5. Documentary materials relating to or the substance of any oral statements containing advice or threats of indictment or the institution of disciplinary action made by the government to any person during the investigation which led to this indictment and prosecution.

C. The Weatherman Organization

Documentary materials made and maintained or received by the Justice Department and the F.B.I. in the ordinary course of business which reflect:

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1. the name, last known address and dates of service in the position of all persons in the chain-of-command between the Director of the F.B.I. and "street-agent" in all F.B.I. field offices, inclusive, from 1968 to the present, whose assignment and responsibility it was to investigate the activities of the Weatherman Organization and to locate and apprehend Weatherman fugitives;

2. the name, last known address and alleged criminal activities of each known or suspected member of the Weatherman Organization from 1968 to the present;

3. F.B.I. efforts and the efforts of other law enforcement and intelligence agencies, federal, state, local and foreign, to investigate the activities of the Weatherman Organization and to locate and apprehend Weatherman fugitives, including but not limited to the establishment of special units or squads within the F.B.I.;

4. involvement or collaboration by the Weatherman Organization or its members with any foreign power or any agent of a foreign power including any known foreign travel by its members from 1968 to the present;

5. the authorization, withdrawal of authorization, or prohibition both specific and general by the President of the United States or any member of his staff, the Attorney General Deputy Attorney General, Assistant Attorneys General, Criminal Division, Internal Security Division and Office of Legal Counsel, and the Director or any Assistant Director of the F.B.I. of the use in the conduct of investigations by the F.B.I. of the Weatherman Organization of electronic surveillance pursuant to 18 U.S.C. 2516 et seq., of warrantless electronic surveillance, the warrantless installation and retrieval of microphones, warrantless entries of any premises and searches and seizures therei mail covers, mail openings and the use of informants and undercover agents;

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6. any special training between 1968 and the present given to or proposed for agents whose assignment and responsibility it was to investigate the activities of the Weatherman Organization and to locate and apprehend Weatherman fugitives;

7. public statements including press releases or testimony before Congress whether public or in executive session by any member of the Executive or Legislative Branches of the Government from 1968 to the present concerning the Weatherman Organization;

8. the classification, designation, or characterization by any member of the Executive or Legislative Branches of the Government from 1968 to the present of the Weatherman Organizatic as a terrorist organization, a subversive organization, a threat to national or internal security, a foreign dominated organization, a purely domestic organization or any other characterization of similar import.

D. The Defense of Selective Prosecution and Lack of Specific Criminal Intent

Documentary materials made and maintained or received by the Justice Department and the F.B.I. in the ordinary course of business from 1939 to the present which reflect:

1. the authority, responsibility and jurisdiction of the F.B.I. to conduct investigations in the fields of domestic and foreign intelligence, sabotage and espionage, subversive activities and terrorism;

2. the delegation within the F.B.I. of the authority, responsibility and jurisdiction to conduct the investigations enumerated in paragraph D1, supra;

3. the authorization, withdrawal of authorization, or prohibition, both specific and general, by the President of the United States or any member of his staff, the Attorney General, Deputy Attorney General, Assistant Attorneys General, Criminal Division, Internal Security Division and office of Legal Counsel and the Director or any Assistant Director of the F.B.I., of

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the use in the conduct of any investigation by the F.B.I. or any other government agency of electronic surveillance pursuant to 18 U.S.C. 2516 et seq., of warrantless electronic surveillance, the warrantless installation and retrieval of microphones, warrantless entries of any premises and searches and seizures therei mail covers, mail openings and the use of informants and undercover agents, except documentary materials related to specific uses of electronic surveillance pursuant to 18 U.S.C. 2516 et seq

4. that the President of the United States or any member of his staff or any employee of the Justice Department except the F.B.I. had knowledge either generally or in specific situations, of the use in the conduct of any investigation by the F.B.I. or any other government agency of warrantless electronic surveillanc the warrantless installation and retrieval of microphones, warrantless entries of any premises and searches and seizures therein, mail covers and mail openings;

5. knowledge on the part of any employee of the Justice Department, except the F.B.I., that any law enforcement officer in the United States, federal, state and local, had utilized, in the conduct of a lawful and official investigation, any investigative technique or committed any act which, on its face, violated any person's rights under the Fourth Amendment to the Constitution of the United States;

6. knowledge on the part of any employee of the Justice Department, except the F.B.I., that any law enforcement officer in the United States, federal, state or local, had utilized, in the conduct of a lawful and official investigation, any investigative technique or committed any act which, on its face, violated any person's rights under the First, Fifth, Sixth or Fourteenth Amendments to the Constitution of the United States.

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E. Prejudicial Pre-Indictment Delay and Prejudicial Public Statements by Justice Department Officials

Documentary materials made and maintained by the Justice Department, except the F.B.I., in the ordinary course of busines which reflect:

1. the first date on which any employee of the Justice Department, except the F.B.I., became aware that warrantless entries of premises and searches and seizures therein had been utilized in the F.B.I. investigation of the Weatherman Organization;

2. the first date on which any attorney of the Justice Department concluded that sufficient evidence had been developed to present an indictment to any grand jury naming W. Mark Felt as a defendant arising out of warrantless entries of premises and searches and seizures therein during the F.B.I. investigatio of the Weatherman Organization;

3. the reasons for delay between the date established in paragraph E2, supra, April 10, 1978, in presenting the indictment herein to any grand jury;

4. the reasons for the selection of the District of Columbia as the jurisdiction within which to institute these proceedings;

5. the role of William C. Sullivan in the matters which are the subject of this indictment, including but not limited to any testimony he may have given before any federal grand jury in connection with the investigation which led to the indictment and prosecution, any and all relevant written or recorded statements made by or for him between 1942 and 1973, made and maintained by the Justice Department and the F.B.I. in the ord course of business, and Mr. Sullivan's personnel file as employee of the F.B.I.;

6. the content or substance of any public state by any employee of the Justice Department from 197 and the content or substance of any private stat

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have been made or reasonably believed to have been made by any known or unknown employee of the Justice Department, to any person representing the news media from 1975 to the present, concerning the investigation which has led to this indictment or its subject matter.

F. Specific Documents the Existence of which is Known to Defendant W. Mark Felt

1. The memorandum and all other documentary materials supporting and relating to it, issued by then F.B.I. Director J. Edgar Hoover in 1966-67, ordering a halt in the use of surreptitious entries.

2. Documentary materials relating to the Cabinet Committee on Terrorism, the President's Foreign Intelligence Advisory Board and the so called "Houston Report".

3. Documentary materials relating to the redesignation in or about February 1973 of the "Domestic Intelligence Division" as the "Intelligence Division" of the F.B.I.

4. Documentary materials relating to the decision of the United States Supreme Court in June, 1972, formally known as United States v. United States District Court, and informally known as the "Keith" decision, including, but not limited to, opinion memoranda by Justice Department attorneys concerning its applicability and documents showing the redesignation of previously designated domestic intelligence subjects as foreign intelligence or intelligence subjects.

5. The memorandum entitled "Position Paper on Jurisdiction" dated February 13, 1975, from the Intelligence Division of the F.B.I., and all other documentary materials supporting and relating to it.

6. The memorandum entitled "An Analysis of F.B.I. Domestic Security Intelligence Investigations: Authority, Official Attitudes and Activities in Historical Perspective", dated October 28, 1975, and all other documentary materials supporting and relating to it.

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7. The memorandum from Robert Haynes, F.B.I. liaison to the White House, which related to his conversation with Egil Krogh in which then President Nixon's views were stated on F.B.I. efforts to halt terrorist acts.

8. The report compiled by the Chicago field office of the F.B.I. in 1966-67 showing the relationship of the Weatherman Organization to foreign governments or their agents.

9. All written or recorded statements of Charles Brennan, including Grand Jury testimony, and his complete personnel file and any documentary materials authorized by him relevant to intelligence and terrorist investigations.

10. The memorandum from William Ruckleshaus, then Deputy Attorney General of the United States, to Clarence M. Kelley, then Director of the F.B.I., dated approximately July, 1973, relating to, among other things, surreptitious entries.

11. A transcript of the testimony of Attorney General Griffin Bell in the United States District Court for the Eastern District of Virginia, Alexandria Division, in March, 1978, in the case of United States v. Humphrey and Hung, Cr. 78-25-A.

12. A transcript of the testimony of Attorney General Griffin Bell and F.B.I. Director William Webster before a Senate Committe in April, 1978, relating to legislation on the subject of F.B.I. investigative jurisdiction and all documentary materials supporting and relating to it.

13. Memoranda between then Deputy Attorney General Byron R. White during 1961-62 and the F.B.I. relating to investigative techniques utilized by the F.B.I. in domestic and foreign intelligence programs and organized crime investigations.

14. Documentary materials relating to the after-the-fact authorization of then Attorney General Nicholas deB. Katzenbach of wiretaps and microphone surveillances of domestic and foreign intelligence subjects and in organized crime investigations during the time Mr. Katzenbach was Attorney General.

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15. Documentary materials relating to the use of warrantless wiretaps, microphone surveillance, surreptitious entries and mail openings in:

a) investigations by the F.B.I. and the Internal Revenue Service between 1957 and 1966 into organized crime matters;

b) the so-called "Kissinger wiretaps";

c) the so-called "Cointelpro" program; and

d) investigations of the Communist and Socialist Workers Parties;

including, but not limited to, the files of the Civil Division of the Justice Department and all pleadings on behalf of the United States in civil actions filed against the United States arising out of these matters.

Defense counsel has sought the materials designated here from the Justice Department attorneys assigned to handle this case. We have already been provided with and have been assured future access to a large part of what has been designated here. Much, however, has also been denied us and, as to many requests, we do not know as yet what will be provided and what will not. Therefore, for the record at this time we feel compelled to make a complete discovery demand with the belief, though, that many of the disputes which still remain can be worked out prior to June 12, 1978, and without the necessity of having to litigate them. In a word, the government has not been "all bad" thus far.

Respectfully submitted,

Brian P. Gettings

Brian P. Gettings, Esquire
Counsel for Defendant W. Mark Felt

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed, postage prepaid, to Thomas A. Kennelly, Diuguid, Siegel & Kennelly, 1000 Connecticut Avenue, N.W., Washington, D. C. 20036; Alan I. Baron, Esquire, Frank, Bernstein, Conaway & Goldman, 1300 Mercantile Bank & Trust Building, 2 Hopkins Plaza Baltimore, Maryland 21201; Francis J. Martin, Esquire, United States Department of Justice, Criminal Division, Washington, D. C. 20530; and Barnett Skolnik, Esquire, Office of U. S. Attorney, 101 East Lombard Street, Baltimore, Maryland, this 22nd day of May, 1978.

Brian P. Gettings

Brian P. Gettings, Esquire

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	Crim. No. 78-00179
v.	:	(Violation of Title 18, United States Code
L. PATRICK GRAY, III, W. MARK FELT, and EDWARD S. MILLER	:	Section 241: Conspiracy Against Rights of Citizens)

DEFENDANT MILLER'S MOTION FOR DISCOVERY

On May 1, 1978, defendant Miller, through his counsel submitted to Government counsel 45 written requests for discovery materials. On May 11, 1978, undersigned counsel received written responses to said requests. The Government has acceded to some of the requests. Of these, some of the documents have already been provided, others are promised in the near future, and others -- characterized by the Government as Jencks and Brady materials -- are promised 30 days before trial.

In all, the Government has acceded to 20 requests in the manner described above.

However, the Government has denied 14 requests in toto and nine requests in part, and to two requests has stated that no such documents are known to Government counsel.

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All of the documents requested and denied are materia to the preparation of Miller's defense, for reasons set forth i the attached Memorandum. Accordingly, defendant Miller pursuant to Rule 16(a)(1)(C) of the F.R.Cr.P. and Rule 2-5(a) o the Rules of this Court, moves the Court for an order grant discovery of the documents set forth in the attached Memor of Points and Authorities which are within the possess

2 ENCLOSURE

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custody or control of the Government, and which are material t the preparation of defendant Miller's defense.

Respectfully submitted,

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TABLE OF AUTHORITIES

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	Crim. No. 78-00179
v.	:	(Violation of Title 18, United States Code
L. PATRICK GRAY, III,	:	Section 241: Conspiracy
W. MARK FELT, and	:	Against Rights of Citizens)
EDWARD S. MILLER		

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANT MILLER's
MOTION FOR DISCOVERY

Introduction:

Generally speaking, Government counsel have agreed to turn over for inspection all FBI files relating to the Weatherman investigation. However -- again generally speaking -- they have denied discovery aimed at (1) determining whether this defendant's conduct was "consistent with the then prevailing statutory or constitutional norms and with long-standing historical precedent" (Zweibon v. Mitchell, D.C.D.C. 2/21/78, 46 L.W. 2449); (2) establishing the defense of lack of criminal intent; (3) establishing the defense of approval of higher authority as an exception to the mistake of law doctrine [U.S. v. Barker, 178 U.S. App. D.C. 174, 546 F.2d 940 (1976)]; (4) determining whether there are grounds for dismissal for pre-indictment delay; and (5) determining whether there are grounds for dismissal because of selective prosecution.

Discovery Needed to Determine Whether an Offense was Committed and Whether Defendant Had the Requisite Criminal Intent

This is an unusual indictment. The offense alleged is that the defendants conspired to "utilize the technique of surreptitious entry" in the Weatherman investigation in 1972-73.

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We have found no statute which prohibits the technique of surreptitious entry. On the contrary, as we pointed out in our motion to dismiss for failure to state an offense, the Government has contended in many cases that surreptitious entries are not inherently unlawful, even in cases not related to national security.[1/]

In the absence of a statute, we must look elsewhere to determine standards of conduct. What we are first trying to determine through discovery is:

> a. What were the policies and procedures concerning surreptitious entries? Were they clear? Did they distinguish between different types of investigations and different types of intrusions?
>
> b. What were the manifestations of the policies and procedures on a case-by-case basis? Did the practices clarify or confuse the rules? Since we are dealing here with the utilization of a technique, only an examination of the other instances in which the technique was applied will enable us to determine if there was illegality as applied in this case.
>
> c. Did this defendant have knowledge of the rules and the applicability so as to demonstrate a knowing violation sufficient here to prove criminal intent?

Toward this end, defendant Miller seeks the following documents:

1. A document entitled "POSITION PAPER ON JURISDICTION, 2/13/75, FBI Intelligence Division," together with all supporting papers.

2. A document entitled "An Analysis of FBI Domestic Security Intelligence Investigations: Authority, Official Attitudes, and Activities in Historical Perspective, 10/28/75," together with all supporting papers.

1/ See, e.g., U.S. v. Ford, 180 U.S. App. D.C. 1 (1977); U.S. v. Agrusa, 541 F.2d 690 (8th Cir. 1976).

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3. All documents issued by the President of the United States or any agency of the Government, effective since 1950 to the present, which define, describe, or explain the term "surreptitious entry."

The Government has denied requests numbered 1-3.

4. All orders, directives, policy statements, or guidelines, issued to or by the FBI regarding the "technique of surreptitious entry," effective 1950 to the present, including but not limited to:

   a. Such documents which describe under what circumstances surreptitious entries are legal and under what circumstances they are illegal.

   b. Such documents which describe what prior approval is required for utilization of the technique of surreptitious entry.

   c. The so-called "Hoover memos" of 1966 and 1967.

5. All documents showing dissemination of any or all of the documents called for in paragraph 4 above to the following offices of the FBI in which Mr. Miller served during the periods indicated below.

   Los Angeles, 1950-51
   San Francisco, 1951-62
   FBI Headquarters, 1962-66, 1969-74
   Mobile, 1966
   Honolulu, 1966-69
   Chicago, 1969

The Government has agreed to provide the documents requested in number 4 and number 5, but only as to "any such orders, directives, etc. issued prior to June 30, 1974 and concerning domestic matters."

We believe that directives issued since Mr. Miller retired in 1974 will demonstrate an admission by the Government that clarification of the rules was sorely needed, and that in 1972-73 this whole area was what many have termed a "legal no-man's land". We make the following proffer: On April 20, 1973, the very day of the arraignment in this case, Attorney General

Bell testified before the Senate Judiciary Committee concerning a proposed FBI Statutory Charter. The following colloquy occurred between Senator Kennedy and Attorney General Bell.

> Senator Kennedy: If we had more clearly-defined procedures which would outline permissible techniques in terms of investigation, as well as those which were prohibited, do you think we would be avoiding the situation that we are confronted with now about indicting the top echelon people and the disciplining agents?
>
> General Bell: Definitely. That has worried me from the very first day I became Attorney General. I have often wondered about this. If our system that we had in place at the time was so inadequate that the error could be committed, I wonder about it. Negligence could be committed, as distinguished from acting with criminal intent. I have wondered about that.

Further, the Government's attempt to limit discovery to "domestic matters" is an oversimplification of the issues in this case. Government counsel should not be allowed to determine what is a "domestic matter". It is material to Miller's defense to demonstrate that the line between "domestic security matters" and "foreign security matters" in 1972-73 was very murky indeed; that investigative rules applicable to both were unclear and were unevenly applied; and that the Weatherman investigation had at least as many "foreign national security" aspects as many other cases in which the Government has attempted to justify warrantless surreptitious entries. This will be discussed further under discovery requests numbered 8-14 below.

6. All FBI records and all records in the possession of the Government, showing that special agents of the FBI conducted surreptitious entries from 1950 through 1974, including documentation showing whether or not such surreptitious entries

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were approved by the President of the United States, the Attorney General, the Director of the FBI, other Government official, or a court order.

The Government denied this request, except to provide only Weatherman files.

This request includes all records relating to the use of surreptitious entries during the period of Miller's employment. This request goes to the question: What were the manifestations of the policies and procedures? The issue of the legality of surreptitious entries and specifically of Miller's criminal intent cannot possibly be determined in a vacuum. This is particularly so in the absence of a statutory standard. Miller's activities in this case can only be measured in terms of long-standing historical precedent, of which he was a part. The Government will not deny that the technique of surreptitious entry has been utilized by Government agents before Miller became an FBI employee and after he left. What were the practices in effect during his employment? Who actually approved surreptitious entries? In comparison with other surreptitious entries, by what standard are those alleged in this indictment now deemed unlawful? Answers to these questions are material to Miller's defense, and can only be obtained by the discovery requested.

In support of this request, we proffer the following: The Government has furnished, in informal discovery, notes of an interview by Government counsel with Mr. William S. Sullivan, former Deputy Director of the FBI, on May 17, 1977. Mr. Sullivan states therein:

a. During the 1950's and early 1960's he (Sullivan) from time to time authorized surreptitious entries on his own.

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b. During the 1955-65 period, surreptitious entries were used in organized crime cases and in the cases of some "Top Ten" fugitives.

c. Mr. Hoover did, on rare occasions, make exceptions to his own rules against surreptitious entries and other methods. One such occasion was in 1969, when Hoover ordered Sullivan to cause Joseph Kraft to be wiretapped in Paris. Sullivan heard that the authorization for this action came from Ehrlichman, and through him from the President.

d. In the 1970-71 period, Sullivan did approve some surreptitious entries himself, orally. He said this was not often done, "but it was not excluded either, if the case was important enough."

e. He believed the Bureau used surreptitious entries around 1968, in the case of a rich heiress who was kidnapped and buried alive in Florida.

f. He recalled three instances in 1970-71 in which Mr. Hoover approved surreptitious entries.

As further grounds for this request, we submit the following: In pre-indictment conferences between Government counsel and counsel for Mr. Miller, the Government contended that the "paucity of paperwork" concerning the surreptitious entries in question, as compared to other instances, is an indicia of guilt. The only way we can test the Government's proof on this issue is to examine and compare the other instances.

7. Those portions of all Department of Justice directives, guidelines, policy statements, orders, memoranda, or manuals effective from 1950 to the present which set forth the conditions for prosecution of FBI employees who utilize the technique of surreptitious entry.

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The documents requested in number 7 go to the issue of whether there were standards of illegality, and whether Miller had notice of same.

8. All documents issued by the President of the United States or any agency of the Government, effective since 1950 to the present, which define or distinguish between the following terms:

   a. "National security", "domestic security", and "internal security".

   b. "Foreign intelligence" and "domestic intelligence".

9. Documents prepared by a joint Department of Justice/FBI committee known as the "Department Review Committee" which reflect that on or about April 8, 1976 and again on or about August 31, 1976, said Committee designated the Weatherman investigation as a national security matter.

10. All other documents which reflect that the Weatherman Underground Organization was ever classified by any government agency or committee as a national security threat or a threat to the internal security of the United States.

11. All documents in the possession of the Department of Justice, the FBI, DOD, CIA, NSA, Department of Treasury, and State Department which show that members of the Weatherman Underground Organization had connections with foreign countries, traveled to or from foreign countries, sent or received communications to or from foreign countries, or received financial or other assistance from foreign countries. Such documents include but are not limited to pertinent documents from the following sources:

   a. The so-called "Chicago Report"; more specifically, a report compiled by the Chicago office of the FBI detailing the relationship of members of the Weatherman organization and foreign governments or agents.

   b. Any electronic surveillance which discloses the information requested in this paragraph including electronic surveillance of one William Ayres, a Weatherman member, which indicates contact with the government of North Vietnam.

   c. Internal documents of the Weatherman organization including all copies in the possession of the government of the publication "Osawatomie", the Weatherman periodical.

d. Any and all reports of foreign law enforcement or governmental agencies including but not limited to the Royal Canadian Mounted Police.

e. Documents in FBI files showing communications between the Weatherman organization, SDS, the "Venceremos Brigade", and the Cuban Mission of the United Nations.

f. Pertinent documents from FBI files designated as "109-12" (foreign political matters) and all subfiles thereunder.

g. Pertinent documents from FBI files designated as "66-1686" (the "June file").

h. Pertinent documents from FBI files described as "Foreign Influence in the New Left" and all subfiles thereunder.

i. All pertinent information obtained from surrendered or apprehended Weatherman fugitives showing foreign connections or influence.

j. The so-called "Cathy Boudin letters from Moscow", believed to be about 100 letters written by Boudin, a known Weatherman fugitive, from Moscow in the early 1970's, and obtained by the CIA.

12. All orders, directives, policy statements, or guidelines issued to or by the FBI, effective from 1950 to the present regarding investigative procedures to be followed in matters involving the national security or internal security of the United States including the installation of electronic surveillance and entries into homes, apartments, or other places.

13. All documents showing dissemination of any or all of the documents called for in paragraph 12 above to the following offices of the FBI in which Mr. Miller served during the periods indicated:

Los Angeles, 1950-51
San Francisco, 1951-62
FBI Headquarters, 1962-66, 1969-74
Mobile, 1966
Honolulu, 1966-69
Chicago, 1969

14. All documents showing whether or not the President of the United States or the Attorney General authorized the "Al Fatah" surreptitious entry or entries in September 1972.

Discovery requests numbered 8-14 seek (1) to clarify, through Government documents, the distinctions, if any really existed, between "domestic national security" and "foreign national security" and similar terms, (2) pertinent investigative guidelines, (3) to establish that the Weatherman investigation had "foreign national security" aspects in that it involved "foreign agents or collaboration with foreign powers" (U.S. v. Ehrlichman, infra).

Mr. Miller contends that the surreptitious entries in question were authorized by his superiors. The defense of an absence of a mens rea based upon a good faith and reasonable reliance on apparent authority is available to him under U.S. v. Barker, supra. The reasonableness of his reliance is based in part on his assertion that the Weatherman investigation was a national security investigation with foreign overtones and therefore warrantless surveillance was legal.[2/] Discovery requested in requests numbered 9 and 10 will show that in 1966 the Weatherman investigation was indeed classified as a national security matter, based on information gathered since 1969. Discovery requested in number 11, which is as specific as possible and is based on Miller's own experience and information available to him, will demonstrate that the Weatherman organization involved "foreign agents or collaboration with foreign powers", the test set forth in Ehrlichman, supra.

2/ The terms "surveillance" and "surreptitious entry" are used interchangeably here in view of the Department of Justice position that in foreign intelligence matters there is no constitutional difference between searches conducted by wiretapping and those involving physical entries into private premises. See U.S. v. Ehrlichman, 178 U.S. App. D.C. 144 at 169 (1976).

In informal conferences, Government counsel have taken the position that the Weatherman investigation was "domestic" only, and therefore any discovery aimed at establishing foreign involvement is irrelevant. This begs the question. Further, this position is difficult to reconcile with the Government's position in other cases in which it has attempted to justify warrantless electronic surveillance on grounds of foreign national security. In Zweibon v. Mitchell, 363 F.Supp. 936 (D.D.C. 1973), the Government argued that warrantless electronic surveillance of the offices of the Jewish Defense League conducted by FBI personnel was in pursuance of a national security investigation with foreign overtones and therefore was legal. In Burkhart v. Saxbe, 3/21/78, 23 Cr.L. 2104 (U.S.D.C. E.Pa.) the Government defended the following wiretaps obtained without warrant or prior judicial approval: (1) a wiretap of a person suspected of being an active member of the East Coast Conspiracy to Save Lives, an anti-war group; (2) a tap of a phone registered to the Philadelphia Chapter of the Black Panther Party. In (1) above, the Government relied on an alleged plot to kidnap Henry Kissinger and destroy heating systems in the District of Columbia. In (2), the Government relied on information that the Black Panther party leaders had visited hostile countries, had met with representatives of North Vietnam and Cuba, were receiving funds from those powers for their revolutionary activities, and had enough followers to be a threat to the national security.

In each of those cases the Government argued that the investigation involved foreign national security. By what

standard does the Government now attempt to preclude us from even raising the same question in discovery here?

The Government has also contended in informal conferences in this case that U.S. v. U.S. District Court (Keith) 407 U.S. 297 (1972), decided shortly before the first surreptitious entry alleged in this indictment, prohibited warrantless entries in domestic security cases, and therefore the defendant should have known that the surreptitious entries alleged here were illegal. Again this begs the question. In Keith the Supreme Court attempted to define the term "domestic organization" (at page 310, fn. 8):

> Although we attempt no precise definition, we use the term "domestic organization" in this opinion to mean a group or organization (whether formally or informally constituted) composed of citizens of the United States and which has no significant connection with a foreign power, its agents or agencies. No doubt there are cases where it will be difficult to distinguish between "domestic" and "foreign" unlawful activities directed against the Government of the United States where there is collaboration in varying degrees between domestic groups or organizations and agents or agencies of foreign powers. But this is not such a case.

Government counsel further contended that a warrantless surveillance based on national security requires approval of the President or the Attorney General, that none was obtained in this case, and therefore all discovery related to national security is irrelevant. Our discovery requests numbered 14-18 seek to determine whether there was in fact such approval, and further, whether there were other surreptitious entries approved solely by Mr. Miller's superiors in the FBI. We have referred to one such instance in our request number 14 and in our motion for severance, and Mr. Miller is informed and believed there were others, even after Keith.

Thus, the discovery requested herein is material to show that Mr. Miller's good faith reliance on apparent higher authority was reasonable because (a) of the foreign national security aspects of the investigation, and (b) it was based on precedent, even after Keith.

Additional Discovery Needed to Establish Defense of Approval of Higher Authority

For the reasons previously stated, the documents requested in numbers 15, 16, 17 and 18 below are needed in preparation of Miller's defense of approval of higher authority.

15. All documents and memoranda prepared by the White House, Department of Defense, CIA, Department of Treasury, Department of State, NSA, Department of Justice, and the FBI concerning plans to deal with the Weatherman Ungerground Organization and other terrorist groups from 1969 through 1974, including but not limited to the so-called "Huston Report" in 1970 or 1971.

The Government has agreed to provide the "Huston Report" but has otherwise denied this request as overbroad. Miller is informed and believes that plans and methods for dealing with the Weatherman Underground Organization and other terrorist groups during the period in question were formulated not merely in the Department of Justice, but at the highest levels of Government, through a "Cabinet Committee on Terrorism" composed of representatives from the above-named agencies. Plans, guidelines, and methods emanating therefrom are material to his defense.

16. All documents showing communication between the White House and the Department of Justice, and the White House and the FBI, concerning plans and investigative methods to deal with the Weatherman Underground Organization and other terrorist groups from 1969 through 1974, including but not limited to:

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a. a memorandum prepared in the early 1970's by Mr. Robert Haynes, FBI liaison to the White House, which related a conversation with Mr. Egil Krogh, the substance of which was that Mr. Krogh stated that President Nixon wanted the FBI to use all means possible to stop terrorist activities.

The Government has agreed to provide the Haynes memo, which we included as a proffer to show the existence of at least one such document. The Government has declined to produce such documents concerning "other terrorist groups". We submit that plans and investigative methods to deal with terrorist groups in general would be material to Miller's defense, and no magic words should be required. The Government has declined to produce the pertinent White House documents, which amounts to half a search, not a whole search.

As a further proffer, we refer the Government to Mr. Sullivan's Grand Jury testimony in which he described phone calls and visits by White House personnel to the FBI concerning ways of "solving the bombing cases, such as the Capitol bombing"; a visit by Mr. Hoover to the White House wherein he met with the President on the same subject; and later conversations between the President and Mr. Hoover on the matter.

17. Those portions of all tapes and transcripts of White House conversations in which the Weatherman Underground Organization and/or other terrorist groups were discussed, during the period from January 20, 1969 through May 31, 1973.

The Government stated in response to our informal requests: "This request is denied as overbroad. However, any known White House tape recordings of any defendant in this case will be made available."

This offer to provide any "known" tapes of any defendant in this case is non-responsive. In the first place, it was not Mr. Miller's custom to speak with White House

personnel. In the second place, we are interested in not only what Mr. Nixon said directly to Mr. Gray[3] but what instructions were given from the Oval Office to White House staffers to be transmitted to the Bureau.

It is common knowledge from the Watergate hearings, and we can offer testimony to establish, that the White House was unhappy with Mr. Hoover's "obstructionism" in the matter of surreptitious entries and similar investigative techniques,[4] and that it was thought that Mr. Gray would be more "responsive". Any directions from the White House would go directly to Mr. Miller's defense of approval of higher authority. The White House tapes are the primary source of such evidence.

18. All documents, including reports and statements of persons interviewed, which indicate that there was an absence of approval by authorities higher than these defendants of the surreptitious entries alleged in the indictment, or that said higher authorities disapproved such surreptitious entries.

At his press conference on the day of the indictment, Attorney General Bell asserted that the investigation disclosed no evidence of any approval by authorities higher than these defendants of the surreptitious entries alleged. We should have an opportunity to test the accuracy and completeness of that assertion in advance of trial, through the documents requested.

3/ Mr. Gray refers in his Grand Jury testimony to a phone conversation with Mr. Nixon on this subject on July 6, 1972.

4/ As demonstrated, e.g., by Hoover's opposition to the "Huston Plan".

Discovery Needed to Establish Prejudicial Pre-Indictment Delay

In connection with our Motion to Dismiss Because of Pre-Indictment Delay the following discovery is requested, for the reasons set forth in that Motion.

19. Reference the Attorney General's press release of 4/10/78 which stated (page 2): "In the course of the investigation, evidence was developed which indicated that the FBI, and perhaps one or more Justice Department attorneys, failed to make full disclosure of surreptitious entries...." Disclose the names and positions of the attorneys referred to, and disclose the evidence referred to, insofar as it shows knowledge of the surreptitious entries by any Department of Justice attorneys prior to 1976. This request includes but is not limited to documentary evidence and statements of witnesses interviewed.

This request has been denied by the Government.

20. All other documents reflecting the personal wishes of FBI Director Hoover with regard to the means to be utilized to catch Weatherman fugitives.

The Government has stated that "No such documentation is known to Government counsel."

21. All evidence showing that any Attorney General of the United States or President of the United States, while in office, learned of the utilization of the technique of surreptitious entry by FBI agents or officials, but declined to order an investigation or rejected an investigation or declined to prosecute any employees or former employees of the FBI.

The Government has stated that it will provide "any such materials relating to surreptitious entries of the nature alleged in the indictment." This response is unclear and too restrictive because, as we point out in our Motion to Dismiss for Failure to State an Offense, the indictment alleges a conspiracy to "utilize the technique of surreptitious entry" without any distinctions. What we seek here in connection with

our pre-indictment delay motion is knowledge of "utilization of the technique of surreptitious entry" in the language of the indictment, and decisions not to investigate or prosecute.

Discovery Needed to Establish Discriminatory Prosecution

In connection with our Motion to Dismiss Due to Discriminatory Prosecution, the following discovery is requested for the reasons set forth in that Motion.

22. A list of all matters or cases from 1950 to the present in which allegations or indications of violations of the Fourth Amendment by law enforcement officers through utilization of the technique of surreptitious entry came to the attention of the Department of Justice.

23. A list of all investigations conducted by the FBI from 1950 to the present for possible violations of the Fourth Amendment by law enforcement officers through utilization of the technique of surreptitious entry.

24. In those investigations referred to above in which a determination not to prosecute was made by the Department of Justice, all documents showing the basis for such determination.

All of the above requests have been denied by the Government. The above documents are necessary to establish a pattern and a policy, during Mr. Miller's entire career with the FBI, not to prosecute law enforcement officers for utilizing the technique of surreptitious entry.

25. All prosecutive reports from FBI special agents to federal prosecutors prepared from 1950 through 1974 which reveal, either directly or by interpretation of FBI code symbols or other nomenclature that special agents of the FBI conducted surreptitious entries.

26. All communications from FBI Headquarters to the Department of Justice or other Government agencies prepared from 1950 through 1974 which reveal, either directly or by interpretation of FBI code symbols or other nomenclature, that special agents of the FBI conducted surreptitious entries.

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The Government has denied these requests, except to provide all FBI files on the Weatherman investigation. This discovery is needed for the reasons set forth following numbers 22, 23 and 24 above.

Finally, the Government has offered to provide all Jencks and Brady materials 30 days before trial. We respectfully suggest that the Court urge the Government to do so not later than 60 days before trial in view of the massive amounts of evidence to be analyzed and the large number of witnesses to be interviewed. For example, the Government has named 30 unindicted co-conspirators. There is no reason in this case to protect witnesses or hide evidence. A 60 day period will permit orderly preparation for trial and hopefully will avoid last minute requests for continuances.

Respectfully submitted,

DIUGUID, SIEGEL & KENNELLY

Thomas A. Kennelly

Howard S. Epstein

Howard S. Epstein

1000 Connecticut Avenue, N.W.
Suite 1112
Washington, D.C. 20036
(202) 872-0700
Attorneys for Edward S. Miller

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	Crim. No. 78-00179
v.	:	(Violation of Title 18, United States Code
L. PATRICK GRAY, III, W. MARK FELT, and EDWARD S. MILLER	:	Section 241: Conspiracy Against Rights of Citizens)

ORDER

Upon consideration of the motion of defendant Edward S. Miller for an order permitting discovery of certain documents, the Memorandum of Points and Authorities in support thereof, and the Government's response thereto, and it appearing to the Court, being fully advised, that defendant Miller is entitled to such discovery,

IT IS HEREBY ORDERED that the motion is granted and that the Government shall permit the discovery of all documents set forth in the defendant's Memorandum of Points and Authorities which are in the possession, custody or control of the Government.

Date _____, 1978

_____
JUDGE, UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA v. L. PATRICK GRAY, III, W. MARK FELT, and EDWARD S. MILLER	Criminal No. 78-00179

CERTIFICATE OF SERVICE

I certify that I have this 22nd day of May 1978 mailed a copy of the within Motion and accompanying papers to the following:

Barnet D. Skolnik, Esquire
Assistant U. S. Attorney
United States Court House
101 West Lombard Street
Baltimore, Maryland 21201

Francis J. Martin, Esquire
Department of Justice
Main Justice Building
Room 2244
10th & Pennsylvania Avenue, N. W.
Washington, D. C. 20530

Alan S. Baron, Esquire
1300 Mercantile Bank & Trust Bldg.
2 Hopkins Plaza
Baltimore, Maryland 21201
Counsel for L. Patrick Gray, III

Brian P. Gettings, Esquire
1400 N. Uhle Street
Arlington, Virginia 22201
Counsel for W. Mark Felt

Thomas A. Kennelly

Thomas A. Kennelly

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112
D. C. 20036
0700

b6
b7C

Director, Internal Revenue Service 6-8-78

Paul V. Daly, Federal Bureau of Investigation BY LIAISON
Defense Discovery Special
Room 6888, JEH
U. S. vs. L. PATRICK GRAY III, ET AL
DEFENSE DISCOVERY/CLASSIFIED MATERIAL

Enclosed is a package of copies of documents from FBI records together with a standard form cover sheet listing each document and explaining, in general terms, the necessity for referring these documents to your agency for your review.

This office is now engaged in reviewing FBI records to be provided to defense attorneys during discovery and possibly for later use by either the prosecution or the defense at trial. The prosecution involved is that announced on April 10, 1978, in which the former Acting Director and two other retired FBI officials have been charged with violating civil rights by surreptitious entries.

We must be able to determine from your reply the following: 1. Whether or not the document is properly classified under the current standards of Executive Order 11652. 2. What portions, if any, your agency feels should not be given to defense counsel during discovery for any of the following three reasons: a. Disclosure would compromise an ongoing investigation. b. Disclosure would compromise an informant or source. c. Disclosure would constitute undue embarrassment or damage to an unrelated third party. 3. What portions of the document, although accessible during discovery, should not be used in open court, eg., classified material not falling into any category under paragraph two, above, which may be exhibited to defense attorneys possessing proper clearances but which should not be used in open court. Marking material which remains classified denoting the classification level down to at least the paragraph level will normally suffice.

62-116345-38X
14 AUG 31 1978

You may make and retain RECOM return all copies of this correspondence, the referral form, and the documents at your option.

(SEE NOTE PAGE 2)

DELIVERED BY LIAISON
DATE 6/9/78

Assoc. Dir.
Dep. AD Adm.
Dep. AD Inv.
Asst. Dir.:
Adm. Servs.
Crim. Inv.
Ident.
Intell.
Laboratory
Legal Coun.
Plan. & Insp.
Rec. Mgnt.
Tech. Servs.
Training
Public Affs. Off.
Telephone Rm.
Director's Sec'y

1 [redacted]
1 Mr. Nicholas
1 ENCLOSURE
JLT:amd (4)

MAIL ROOM

84 SEP 14 1978

Greenberg/Gray-2318

FBI/DOJ

Director, Internal Revenue Service

Documents furnished may include both documents originated by your agency, FBI documents quoting information from your agency, and FBI documents concerning an area in which your agency has the primary or overriding interest. Complete documents will normally be furnished in order that you might see the material of interest to you in context. Partial documents will often be furnished when a significant portion of the material does not relate to your agency and is not necessary to understand the material and its context.

We will continue to encounter material of interest to your agency. This letter has been prepared in order to alert you more specifically to the anticipated continuing need for such referrals and to explain the object of the referral. In the future, we plan to make any necessary additional referrals by the use of the attached cover sheet only, if you have no objections.

The Department of Justice has requested us to seek the most expeditious handling of this material which may be possible under the circumstances. Any consideration you may be able to give their request will be appreciated.

Enclosure

NOTE: Future requests will be handled through liaison with cover sheet only, except when ~~TOP SECRET~~ or compartmentalized material is involved. When necessary, receipts will accompany the cover sheet. Each cover sheet identifies those documents being referred by serial and gives a more concise set of instructions regarding the review needed.

Greenberg/Gray-2319

R

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

WASHINGTON, D.C. 20535

DATE: _____

SPECIAL OFFICE FOR DEFENSE DISCOVERY
Room 6888, Hoover Building
Return Atten: BRENNAN
b2 Telephone: [redacted]

To Agency: CIA_____ NSA_____ DOD_____ Customs_____ Postal_____
Army_____ Navy_____ Air Force_____ Other IRS

The documents listed below originated with your agency or contain information received from your agency. They are needed for use in the prosecution or the defense of the case of United States v. L. Patrick Gray, III, et al. Please review your agency's materials or information for compliance with current classification procedures under Executive Order 11652. In addition, please note by listing or bracketing any material which should not be released to the defense because of: (a) ongoing investigations, (b) protection of informants or sources, or (c) release would constitute undue embarrassment or damage to unrelated third parties. The reason for the deletion you recommend should be shown in the margin or on the list by noting the letter a, b, or c, as appropriate.

Documents:

File Topic	File #	Serial #	Date
Weatherman	100-439048 Sec 69.	3751	10/31/74

Enclosure 6-8-78
Director, Internal Revenue Service

~~SECRET~~/~~CONFIDENTIAL~~/UNCLASSIFIED
MATERIAL ATTACHED

62-118045-38X

ENCLOSURE Greenberg/Gray-2320

June 15, 1978

MR. ADAMS:

In accordance with your instructions, the purpose of this note is to respond to the Director's question on the attached routing slip. The background is as follows:

By letter from the Director to the Attorney General 5-9-78 (copy attached) the Bureau, in essence, expressed its concern over the large volume of material in the possession of the Department which has not received an appropriate classification review. Among other things, the Bureau specifically requested the return of the at least 81 volumes of material in the custody of the Department which are not essential to the current prosecution. b6 b7C

The 5-31-78 communication from the Department to the Director (attached) is in response to our communication of 5-9-78. The Director raised the following question relative to this latter communication: "How does this tie to [redacted] letter to AG?" b6 b7C

Assuming the Director is referring to the personal letter which Section Chief [redacted] sent to the Attorney General under date of 5-31-78 (copy attached), the answer to the Director's question is that it does not tie in to [redacted] letter. While [redacted] covered a multitude of matters in his communication, the thrust of his letter was a request of the Department to pay his $2100 attorney fees because he felt he required the services of an attorney due to alleged abusive attempts by the Department to intimidate him.

REC-14 REC-118 62-118045-39

While not pertinent to the Director's inquiry, I, nevertheless, feel that comments are appropriate relative to the Department's letter of 5-31-78. Specifically, there are two statements in this letter that are quite misleading. Sentence 2, paragraph 1, states that "Documents compiled by the Long Task Force which are not of potential use to the prosecution team are stored in the JEH Building ...." It is true that there are copies of a great deal of material which the Long Task Force made available to the Department reposing in the JEH Building, but the 81 volumes of material referred to above are still in the custody of the Department. Moreover, the last sentence in paragraph 1 indicates that documents retained in the Criminal Division of the Department are being reviewed by an Agent of our Discovery Team prior to any release. The only documents which the Department has made available for classification review were the 17 documents which they initially furnished to the defendants under Rule 16. As you may recall, this review by us was an "after-the-fact" situation and it was necessary for the Department to retrieve 4 of these 17 documents because they involved third agency material and were highly classified. In all, it is not felt that this communication from the Department is responsive to the Director's letter of 5-9-78 and, unless advised to the contrary, the 2 Agents heading up the Discovery Team intend to pursue the Bureau's request for return of the 81 volumes of material still in the possession of the Department and which, in many instances, contain highly sensitive and classifiable material.

14 AUG 31 1978

ENCLOSURE

Encs. (4)

4 - PVD

H. N. BASSETT

8 4 HNB:jmrg (5)

OPTIONAL FORM NO. 10
JULY 1973 EDITION
GSA FPMR (41) CFR 101-11.6

UNITED STATES GOVERNMENT

Memorandum

TO : The Attorney General

DATE: May 9, 1978

FROM: Director, FBI

SUBJECT: SAFEGUARDING OF NATIONAL SECURITY INFORMATION AND MATERIAL (SURREPTITIOUS ENTRY INVESTIGATION)

In connection with the Civil Rights Division investigation of surreptitious entries, in June, 1976, a special task force under the supervision of Assistant Director Richard E. Long of this Bureau was appointed to assist under the direct supervision of then Assistant Attorney General J. Stanley Pottinger. Members of the FBI task force were selected to a large degree based on the fact they had limited intelligence or security backgrounds.

In recent weeks, we have determined 81 volumes of documents from the files of FBI Headquarters and its field offices were provided by the Long task force to the Civil Rights Division and more recently to the Criminal Division task force which has assumed responsibility for the investigation. Many of these documents are of a sensitive nature and relate to intelligence sources and methods and ongoing operations. The majority were prepared for internal FBI use and, as such, those classifiable documents produced prior to the spring of 1974 were not marked to indicate their levels and characters of classification.

We are concerned regarding these documents as many of the Department Attorneys responsible for their custody and who will be working with them in connection with prosecution in the matter of United States v. L. Patrick Gray, et al., and discovery pertinent thereto, are inexperienced as relates to the clearances, accountability, transmission and storage of classified national security information and material. The FBI Document Classification/Security Officer has been in contact with the Department Security Officer to express his concerns, and it is my understanding the Department Security Office is currently looking into this matter in cooperation with Criminal Division Attorneys.

62-116065

Encl. to Informal note 62-118045-39
to Mr. Adams from
H. N. Bassett 5-15-78

ENCLOSURE

HNB:lsm

The Attorney General

In accordance with Title 28, Code of Federal Regulations, Part 17.81, the FBI Document Classification/ Security Officer is conducting internal inquiries at FBI Headquarters in an effort to determine the full circumstances by which these classifiable documents were referred to the Department in unmarked and unexcised form. He is available to assist and collaborate with the Department Security Office in any manner which will further protect these sensitive documents which are in the custody of the Criminal Division. I would appreciate being advised of the results of any inquiry conducted by the Department Security Office regarding the safekeeping, accessibility, accountability and storage currently being afforded to these documents.

Because of the overall sensitivity of the material in the 81 volumes in the custody of the Department special task force, I request all of these documents which are not essential to the current prosecution and discovery responsibilities of the Department be promptly returned to the FBI so appropriate classification action, accountability and storage may be ensured.

1 - Mr. Leon Ulman, Chairman
Department Review Committee

1 - Mr. Robert L. Dennis, Director
Administrative Programs Management Staff
Office of Management and Finance

1 - Mr. Benjamin R. Civiletti
Assistant Attorney General
Criminal Division

UNITED STATES GOVERNMENT

Memorandum

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

Assoc. Dir. ___
Dep. AD Adm. ___
Dep. AD Inv. ___
Asst. Dir.:
Adm. Servs. ___
Crim. Inv. ___
Ident. ___
Intell. ___
Laboratory ___
Legal Coun. ___
Plan. & Insp. ___
Rec. Mgnt. ___
Tech. Servs. ___
Training ___
Public Affs. Off. ___
Telephone Rm. ___
Director's Sec'y ___

TO : Mr. Bassett HNB/jr

DATE: 5/31/78

FROM : [redacted] b3 b6 b7C

1 - Mr. J. J. McDermott
1 - Mr. H. N. Bassett
1 - [redacted]

SUBJECT: SPECIAL AGENT [redacted] b3 b6 b7C
PERSONAL MATTER

[redacted] b6 b7C

[redacted] b6 b7C

Attached is a copy of a letter I sent today to the Attorney General, with a copy for the Counsel, Office of Professional Responsibility, requesting I be reimbursed for attorney fees in connection with my subpoenaed appearance before the Federal grand jury at Washington, D. C., on March 31, 1978.

RECOMMENDATION: None. For information.

Enclosure

DR:lfj
(4)

ENCLOSURE

File in [redacted] Personnel File
SA 6/5/78 WHB
4-WHB

b6 b7C

encl. to informal note to Mr. Adams from H. N. Bassett 6-15-78 HNB:jmr

REC-144 67- [redacted]
Searched
6 JUN 7 1978
Greenberg/Gray-2325

42-118045-39

3 JUN 9 1978

FBI/DOJ

ENCLOSURE

JACK B. SOLERWITZ
ATTORNEY AND COUNSELOR AT LAW
170 OLD COUNTRY ROAD
MINEOLA, L. I., N. Y. 11501

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'CK B. SOLERWITZ

ALVATORE A. LECCI
EFFREY S. BURNS
SEPH P. ABBENDA
AN E. WOLIN
ONARD B. ISAACS
ROLD D. WOLIN

WASHINGTON, D. C. OFFICE
1101 15TH STREET, N. W.
WASHINGTON, D. C. 20005
SUITE 204

(202) 466-3800

May 10, 1978

[redacted] b3 b6 b7C

FOR PROFESSIONAL SERVICES RENDERED:

Justice Department
Civil Rights Division Inquiry

(20 hours at $100 per hour)	$ 2,000.00
*Expenses	100.00
TOTAL	$ 2,100.00

* Computation of Expenses
This represents $80 incurred by my office as a result of transportation to and from Washington, D.C. on March 31, 1978, to represent [redacted] in addition to other miscellaneous expenses such as telephone calls, taxi fees, etc. b3 b6 b7C

Greenberg/Gray-2332

ENCLOSURE 118045-39

ENCLOSURE

b6
b7C

Assoc. Dir. ____
Dep. AD Adm. ____
Dep. AD Inv. ____
Asst. Dir.:
Adm. Servs. ____
Crim. Inv. ____
Ident. ____
Intell. ____
Laboratory ____
Legal Coun. ____
Plan. & Insp. ____
Rec. Mgnt. ____
Tech. Servs. ____
Training ____
Public Affs. Off. ____
Telephone Rm. ____
Director's Sec'y ____

UNITED STATES GOVERNMENT

Memorandum

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

TO : Mr. Bassett

DATE: 6-22-78

FROM : P. V. Daly

SUBJECT: U. S. vs. L. PATRICK GRAY III, ET AL

PURPOSE: To record receipt of Government response, and memorandum in support thereof, to defense motions for discovery.

DETAILS: Memorandum captioned as above and dated May 26, 1978, records receipt of a letter dated May 25, 1978, from Francis J. Martin of the Department of Justice's Task Force. That memorandum outlined additional records to be reviewed in the event the court ruled against the prosecution, or if a negotiated settlement in disputed areas was achieved. Martin was contacted on June 20, 1978, by SA [redacted] for clarification of several issues.

Although we have not been given complete copies of the defense motion papers, because they include references to Grand Jury testimony, the Department's arguments contain several potential changes from past positions:

1. The Department agrees to furnish all files relating to Weatherman. In the past, a list of general files and individual files on subjects directly related to the entries charged had been agreed upon. Martin now states he intends this to be open-ended: The defense may request additional files to be processed. The Department will resist unreasonable or excessive demands in court, if necessary. The Department intends the term "Weatherman files" to include all related files, ticklers, and "Do Not File" memoranda known to exist.

62-118045-40

2. The Department agrees to extend the cut-off date from June 30, 1974, up to December 31, 1975. Mr. Martin has advised he is certain defendant Gray seeks to establish that entries occurred under Director Kelley in order to show entries could also have occurred under Gray without his knowledge. It had been suggested to Martin that he offer to the defense the documents reflecting such entries, rather than

Enclosures

1 ENCLOSURE

1 - Mr. Bassett (Enclosures - 2)
1 - Mr. Daly (Enclosures - 2)

14 SEP 1 1978

(CONTINUED - OVER)

JLP:dmd (3)

8 4 SEP 14 1978

FBI/DOJ

the entire files, to reduce the processing burden on both sides. Martin now says to hold this in abeyance pending his further contact with defense.

3. The Department agrees to furnish information for all "Bag Jobs after the 1966 Hoover cut-off," presumably through December 31, 1975. Martin now says to furnish all documents of which we are aware (including SNCC and CPUSA in New York), but not to institute an exhaustive search.

4. The Department agrees to furnish records on the President's Foreign Intelligence Advisory Board and the Cabinet Committee to Combat Terrorism as they relate to Weatherman only, not in their entirety as we had been instructed to process. Martin now says to process any materials showing personal contact by any defendant, but only that material relevant to Weatherman, if contact was by a subordinate rather than the defendants. We should not widen the scope of this topic if severe "third agency" referral problems result.

5. The Department agrees to furnish evidence of notice concerning use of surreptitious entries to the President or the Attorney General from 1950 on, although they continue to argue against the defense of selective prosecution. Martin comments the material is relevant to a defense of implied authority by tacit approval, but not to selective prosecution.

6. The Department agrees to furnish records concerning any special training for personnel working on Weatherman, an increase from the previous instruction. Martin restricts this to Weatherman-related files (such as SPECTAR) and does not limit it to the August and October 1972 In-Services.

Martin also stated the Department will determine the names for the list of deceased potential witnesses. He would now include William C. Sullivan, Hugh Mallett, and Sterling Donahoe, but may ask us to determine the status of members of the "SAC Conference" (presumably the Executive Conference) and the old IS-2 Section.

Martin expects oral argument on the issues of foreign influence and change of venue to be set some time between late next week and three weeks in the future. The judge may rule on pre-indictment delay and selective prosecution from the bench.

P. V. Daly to Mr. Bassett Memo
Re: U. S. vs. L. Patrick Gray III, et al

Martin will return the original Philadelphia and Newark Field Office files to us within the next few days in order that we might process them under discovery. A copy of the Government's response and memorandum is attached.

RECOMMENDATION: None, for information.

APPROVED:	Adm. Serv.	Legal Coun.
Director	Crim. Inv.	Plan. & Insp.
Assoc. Dir.	Ident.	Rec Mgnt. HNB
Dep. AD Adm.	Intell.	Tech. Servs.
Dep. AD Inv.	Laboratory	Training
		Public Affs. Off.

Greenberg/Gray-2335

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIMINAL NO. 78-000179
	)	
L. PATRICK GRAY, III	)	
W. MARK FELT	)	
and	)	
EDWARD S. MILLER	)	

RESPONSE OF THE UNITED STATES TO DEFENDANTS' MOTIONS FOR DISCOVERY AND INSPECTION

NOW COMES the United States of America by its attorneys and in response to the capitoned motions states as follows:

I.

Defendants seek to have this Court order the government to produce various materials requested in their discovery motions. The discovery process in this case has progressed expeditiously. At arraignment on April 20, 1978, Judge Richey ordered the government to produce for the defense all Rule 16 materials by April 25, 1978. Defense counsel were provided on that date with the seventy-seven (77) documents that the government believes are producible as Rule 16 discovery. Thereafter, government and defense counsel entered into an exchange of correspondence in an effort to resolve as many discovery issues as possible through informal negotiation. 1/ The result of these informal negotiations has been as follows: of one hundred and fifty-three (153) discovery requests 2/ calling for production of materials, the government has agreed to comply in full with twenty-nine (29) discovery

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1/ Some discovery requests are counted more than once because the same request is made by two or all three, defendants. The total number of separate discovery requests is therefore somewhat below one hundred and fifty-three (153).

2/ The process of informal negotiation is continuing. Government and defense counsel will inform the Court prior to the hearing on the discovery motions, of any additional discovery requests that have by that time been resolved.

requests and in part with fifty-one (51) other discovery requests. Twenty-five (25) additional requests will be complied with not as discovery but as Jencks and Brady disclosures. Thus, the government has totally declined to produce the materials sought in only forty-eight (48) of the hundred and fifty-three (153) discovery requests, variously on the grounds that such requests are overbroad, not material to any defense or unclear.

The government has already provided defense counsel with statements of the defendants, including grand jury testimony, as well as all documents which the government intends to introduce at trial, in accordance with Rule 16, F.R. Crim. P. In addition to agreeing to the various specific discovery requests, the government has undertaken to make available to defense counsel all FBI files relating to the Weatherman Organization, to its members and supporters, as well as to the "relatives and acquaintances" of Weatherman fugitives who are referred to in paragraph 6 and Overt Acts 6 through 32 of the Indictment. These Weatherman files 3/ contain all known information concerning the FBI's Weatherman investigation, including information relating to the use of warrantless surreptitious entries and searches, wiretaps, microphone installations, mail covers, mail openings, informants and undercover agents. The government has already made available, initially, approximately four hundred and fifty (450) volumes (roughly ninety thousand [90,000] pages) of Weatherman files, including all such files relating to the "relatives and acquaintances of Weatherman fugitives" named in the Indictment. It is respectfully suggested that the massive scope of the government's voluntary undertaking, opening up to defense counsel all of the FBI's vast files on the Weatherman, should be considered by

3/ The government has agreed to make available all Weatherman files for the period up to June 30, 1974, the date the last of these defendants, Mr. Miller, retired from the FBI. Counsel for Mr. Gray has objected to this cut-off date, noting that it is material to Gray's defense to show that warrantless surreptitious entries in the Weatherman investigation continued until at least November 1974. Because such evidence might be material to Gray's defense, the government will agree to add an additional eighteen (18) months to this cut-off date, i.e., to provide Weatherman files up to December 31, 1975. Government counsel, in good faith, proffer that the government's investigation of the FBI's use of various investigative techniques in the Weatherman investigation did not disclose the occurrence of any warrantless surreptitious entries after December 31, 1975.

this Court in its assessment of the validity of defendants' need for the materials demanded by many of their other discovery requests.

II.

The government will respond below seriatim to each discovery request by defendants Gray, Felt and Miller. Many of these requests are facially overbroad and should be denied in reliance on United States v. Haldeman, 559 F.2d 31, 75 (D.C. Cir. 1976) and United States v. Ross, 511 F.2d 757 (5th Cir. 1975). Other requests should be denied in reliance on the specific authorities cited herein.

The vast majority of defendants' discovery requests present several common issues of law which are addressed fully in our accompanying Memorandum in Support of the Response of the United States to Defendants' Motions for Discovery and Inspection (hereinafter "Memorandum"). Part I of our Memorandum discusses discovery relating to: (A) the timing of the government's obligation to produce materials under the Jencks Act and Brady v. Maryland, 373 U.S. 83 (1963); (B) the showing of an invidious discrimination which is necessary in order to establish a claim of selective prosecution, United States v. Ojala, 544 F.2d 940 (8th Cir. 1976); (C) the showing of actual prejudice which is necessary in order to establish a claim of pre-indictment delay, United States v. Lovasco, 431 U.S. 783 (1977); (D) the showing that a fair trial must be presumed to be impossible in order to establish a right to pre-voir dire relief from prejudicial pretrial publicity, United States v. Haldeman, supra, at 63-64; and, (E) the special circumstances attendant upon any discovery of White House files. United States v. Nixon, 418 U.S. 683 (1974); Nixon v. Administrator of General Services, 433 U.S. 425 (1977).

Part II of our Memorandum addresses the crucial issue of whether there is available to defendants Felt and Miller in this case, as a matter of law, any defense based on justification for, or a mistaken belief as to the legality of, the warrantless searches alleged in the Indictment and consequently whether any discovery in support of such defenses should be ordered. United States v. Ehrlichman, 546 F.2d 910 (D.C. Cir. 1976); United [illegible] 546 F.2d 849 (D.C. Cir. 1976).

III.

DEFENDANT GRAY'S DISCOVERY REQUESTS

"I. Documents and other Information Discoverable as Brady Material"

1) This request, for "all information. . .tending to exculpate the defendant", seeks Brady material which the government has agreed to make available thirty (30) days before trial. See Memorandum, Part I(A).

2) This request, for a statement as to whether any government trial witness is "under investigation or indictment, or was or is subject to disciplinary action", seeks Brady material which the government has agreed to make available thirty (30) days before trial. See Memorandum, Part I(A).

4) 4/ This request, for the identity and statements of "each person questioned by the government who will not be called as a witness", although not barred by the Jencks Act, should not be ordered without a showing of materiality by the defense. United States v. Kearney, 436 F. Supp, 1108, 1112 (S.D.N.Y. 1977); United States v. Marshak, 364 F. Supp. 1005, 1007-08 (S.D.N.Y. 1973); 8 J. Moore, Federal Practice, ¶ 16.05[4] (2d. ed. 1977).

5) This request, for disclosure of "all promises, inducements or rewards" given to any government trial witness, seeks Brady material which the government has agreed to make available thirty (30) days before trial. See Memorandum, Part I(A).

6) The government will make available the requested documents 5/ i.e., documents "reflecting efforts taken during Mr. Gray's tenure to ensure that the FBI operated within the confines of the Keith decision."

"II. Documents and Other Information Discoverable as Jencks Material"

7) Rule 16, as amended, intentionally excludes the disclosure of the requested witness lists. H.R. Conf. Rept. No. 94-414, 94th Cong. 1st Sess. (1975). Witness statements are Jencks material

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4/ Defendant Gray's discovery motion does not list any request #3.

5/ As used herein the term "documents" is meant to be coextensive with the listing of all things, e.g., books, records, recordings, in the particular defense discovery request to which the government is responding.

which the government has agreed to provide thirty (30) days before trial. See Memorandum, Part I(A).

8) Witness statements as to the conversation alleged in Overt Act 1 will be provided as Jencks material thirty (30) days before trial. See Memorandum, Part I(A).

9) All documents known to government counsel revealing the content of statements made by Mr. Gray as alleged in Overt Act 2 have already been provided to the defense as Rule 16 material. Witness statements concerning Overt Act 2 will be provided as Brady and Jencks material thirty (30) days before trial. See Memorandum, Part I(A).

10) This request, for statements of co-conspirators which the government intends to offer in evidence at trial, seeks Jencks material that the government has agreed to provide thirty (30) days before trial. See Memorandum, Part I(A).

11) This request seeks written and oral statements of co-defendants, before or after the conspiracy, which the government intends to introduce in evidence at trial. Discoverable material called for by this request, to the extent it is presently identifiable by government counsel, has already been provided to defense counsel pursuant to Rule 16; any such material so identified by government counsel hereafter will be provided at that time. Jencks material will be provided thirty (30) days before trial.

"III. Documents and Other Information Material to Defendant's [Gray's Preparation of His Defense That the Allegedly Wrongful Activity Was Undertaken Without His Knowledge or Authority"

12) This request, for all documents which "reflect that FBI agents engaged in warrantless surveillance techniques from the period January 1, 1960 to the present", is facially overbroad. All "warrantless surveillance techniques" would include every national security wiretap or microphone surveillance properly authorized by the Attorney General during the last eighteen (18) years, including those presently in operation. The government should not be required t

comply with such a facially overbroad discovery request. 6/ United States v. Haldeman, supra; United States v. Ross, supra, at 763.

13) There are no documents known to government counsel that reflect that Gray was made aware of the surreptitious entries alleged as Overt Acts in the Indictment.

14) There are no documents known to government counsel that reflect that Gray was made aware of the memoranda, communications, or conversations set forth in Overt Acts 6 through 32 of the Indictment.

15) As with Gray discovery request #12, this request, for all files "marked either 'June' and/or 'Do Not File' from the period January 1, 1960 to the present", is facially overbroad. "June" is an FBI designation placed on any document relating to electronic surveillance, or in some instances to mail covers and surreptitious entries. Production of this material would require disclosure of every lawful electronic surveillance conducted by the FBI in the last eighteen (18) years. As to "Do Not File" documents, such documents are generated on an ad hoc basis and do not of necessity relate in any way to the subject matter of this case. Any "June" and/or "Do Not File" documents relating to the Weatherman investigation are already available to the defense for inspection as part of the government's undertaking to make available all Weatherman files. Beyond this, the defense should not be allowed to embark on such an overbroad fishing expedition. United States v. Haldeman, supra; United States v. Ross, supra.

16) This request seeks all reports by the FBI's Inspection Division concerning its routine yearly inspection of any FBI field office, if that field office had some part in the FBI Weatherman investigation. This discovery is sought to establish the proposition that "FBI inspectors routinely destroyed papers in field offices relating to black bag jobs." (Gray Memorandum, p. 4).

6/ The government would not oppose a discovery request, more narrowly drawn and clearly material, intended to aid defendant Gray in establishing that surreptitious entries of the nature alleged in the Indictment were in fact approved at FBI headquarters, without authorization of the Attorney General, after the 1966 Hoover cut-off. Such discovery would be limited to documents dealing with the authorization process and thus would not disclose the identities of participants in targets of, such entries. Such discovery would also be limited to entries occurring prior to the commencement of the Justice Department investigation of surreptitious entries.

Defendant Gray's proffer is accurate as to procedures used prior to Director Hoover's 1966 ban on black bag jobs. However, government counsel are unaware of any support for the proposition that such routine destruction continued as a matter of policy thereafter. Indeed, the existence of the so-called "SAC memos" listed in the Indictment (Overt Acts 8, 12, 25 and 29) and similar "SAC memos" already provided to the defense is evidence to the contrary. Absent a more meaningful proffer as to actual destruction of documents, as well as some clearer showing of materiality, the government should not be required to produce inspection reports, averaging 200 to 800 pages each, for dozens of FBI field offices over the last ten (10) years. United States v. Haldeman, supra; United States v. Ross, supra.

17) This request, for documents showing that "House and Senate Intelligence Committees and the General Accounting Office were misled" concerning the extent of FBI bag jobs, is not material to Gray's defense. These Congressional investigations took place long after Mr. Gray and his co-defendants had left the FBI. Absent a more meaningful proffer of materiality this request should be denied. United States v. Haldeman, supra; United States v. Ross, supra.

18) The government will provide any documents reflecting contact during Mr. Gray's tenure between the President's Foreign Intelligence Advisory Board and the FBI with regard to the Weatherman Organization. Discovery as to any such contacts regarding matters other than the Weatherman Organization, however, should be denied as not material to Gray's defense. United States v. Haldeman, supra; United States v. Ross, supra; see also Memorandum, Part II.

"IV. Documents and Other Information Material to Defendant's [Gray's] Preparation of His Defense That the Indictment is Subject to Dismissal for Improper Selective Prosecution by the Government"

19) This request seeks documents which reflect communications from FBI headquarters to the Department of Justice which reveal, directly or indirectly, that FBI agents conducted warrantless

surreptitious entries. Discovery should be denied because the defendant has failed to allege that his prosecution is based upon an invidious discrimination. See Memorandum, Part I(B).

20) This request seeks documents which reflect that the Department of Justice was aware of the FBI's use of warrantless surveillance techniques. Discovery should be denied because the defendant has failed to allege that his prosecution is based upon an invidious discrimination. See Memorandum, Part I(B).

21) This request seeks all prosecutive reports from FBI agents to federal prosecutors in the last eighteen (18) years that reflect that FBI agents engaged in warrantless surveillance techniques. Discovery should be denied because the defendant has failed to allege that his prosecution is based upon an invidious discrimination. See Memorandum, Part I(B).

22, 23 and 24) These requests seek lists of all matters over the last twenty-eight (28) years in which allegations of Fourth Amendment violation, through the use of surreptitious entry by law enforcement officials, have come to the attention of the Department of Justice (Request #22), or were investigated by the FBI (Request #23); and all documents relating to decisions to decline prosecution with regard to such matters (Request #24). Discovery should be denied because the defendant has failed to allege that his prosecution is based upon an invidious discrimination. See Memorandum, Part I(B).

25) This request seeks documents concerning investigations of the Weatherman Organization by government agencies other than the FBI. Discovery should be denied because the defendant has failed to allege that his prosecution is based upon an invidious discrimination. See Memorandum, Part I(B).

"V. Documents and Other Information Material to Defendant's [Gray's] Preparation of His Possible Defense That the Allegedly Wrongful Activity was Authorized by Higher Authority"

26 and 27) These requests seek documents showing that the President, Attorney General, Director of the FBI, or their agents

authorized (Request #26) or withdrew authority for (Request #27), warrantless wiretapping, microphone surveillances, or surreptitious entries directed at members of the Weatherman Organization or their supporters. All such information may be found in the Weatherman files, which the government has already made available to defense counsel.

28 and 29) These requests seek the same types of information as Requests #26 and 27, but seek this information as to all FBI investigations other than Weatherman. These requests are not limited in time and presumably include the entire history of the FBI. Defendant Gray has made no showing of materiality as to the requested material, United States v. Haldeman, supra. The defense of higher authority (if any) must relate to higher authorization for Weatherman warrantless searches as alleged in the Indictment. See Memorandum, Part II.

30) The government will provide any documents concerning the creation and function of, or contacts with the FBI during Gray's tenure by, the Cabinet Committee to Combat Terrorism, to the extent that such documents relate to the Weatherman Organization. Discovery as to any such contacts regarding matters other than the Weatherman Organization should be denied as not material to Gray's defense. United States v. Haldeman, supra; United States v. Ross, supra; see also Memorandum, Part II.

31) This request seeks all documents from six government agencies, 7/ in addition to the FBI, which concern plans to deal with the Weatherman Organization or other terrorist groups during the period 1969-1974. The government has agreed to make available the specifically requested "Huston Report" (which deals, in part, with the use of surreptitious entries in the Weatherman investigation), as well as all FBI Weatherman files. Plans by other government agencies to deal with the Weatherman, as well as any government plans

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7/ One of the six government agencies listed in this request is the White House. The special circumstances attendant upon discovery of White House files and tapes are discussed in the accompanying Memorandum, Part I(E).

to deal with "other terrorist groups", are not material to any available defense. See Memorandum, Part II.

32) This request seeks all documents reflecting communications between the White House and the Department of Justice or the FBI concerning plans and investigative methods to deal with the Weatherman Organization or "other terrorist groups" during the period 1969-1974. The government has agreed to make available the specifically requested "Haynes Memorandum", and any other similar FBI documents, as part of its undertaking to make available all Weatherman files. The government has also agreed to institute an appropriate search of Department of Justice files for any such documents relating to the Weatherman. Discovery concerning "other terrorist groups" should be denied as not material to any available defense. See Memorandum, Part II. The government does not oppose an appropriate search of White House files. See Memorandum, Part I(E).

33) This request seeks all tapes and transcripts of White House conversations in which the Weatherman Organization and/or "other terrorist groups" were discussed, during the period January 20, 1969 through May 31, 1973. Discovery of such tapes and transcripts concerning "other terrorist groups" should be denied as not material to any available defense. See Memorandum, Part II. The government does not oppose an appropriate search of White House tapes and transcripts. See Memorandum, Part I(E). The government will produce any such tapes and transcripts, including all known conversations of any defendant, that are in the possession of government counsel.

34) This request seeks documents, including "statements of persons interviewed", which indicate that the surreptitious entries alleged in the Indictment were not authorized by officials in a position of authority higher than the defendants. The existence of such higher authorization would be a possible defense, and any evidence indicating that such authority existed would be Brady

material. See Memorandum, Part II. Evidence that there was no such authorization is thus potentially part of the government's rebuttal case and is therefore not discoverable, other than in accordance with the Jencks Act. See Memorandum, Part I(A).

35) The government will make available the requested documents reflecting whether the President or Attorney General authorized any "Al Fatah" surreptitious entry or entries in September 1972.

36) This request seeks all documents reflecting that the President, Attorney General, or their representatives were advised that the FBI investigation of the Weatherman would include surreptitious entries. Government counsel are unaware of any such documents, other than the "Huston Report". Should any such documents be discovere they will be made available to all defense counsel.

37) This request seeks all documents reflecting that Congressional committees investigating the Weatherman bombing of the Capitol were advised that the FBI's investigation would include, or had included, surreptitious entries. Government counsel are unaware of any such documents, but will institute an appropriate search of FBI files.

38) This request seeks all FBI guidelines during the last twenty-eight (28) years regarding investigative procedures to be followed in national security matters, including electronic surveillanc and surreptitious entry. This discovery request should be denied as not material to any available defense. See Memorandum, Part II.

39) This request seeks documents disclosing that "FBI agents received incentive awards for conducting surreptitious entries" during the last twenty-eight (28) years. The defendant has failed to make any proffer of the materiality of any such documents. United States v. Haldeman, supra.

8/ The government's investigation of this case sought to locate any such documents, with negative results. Should defense counsel bring to the government's attention any relevant specific files, as to which a search would be appropriate, such a search, if not previously conducted, will be made.

"VI. Documents and Other Information Material to Defendant's [Gray's] Preparation of His Defense that the Allegedly Unlawful Activity was Conducted in Response to a Threat to the National Security which Justified the Use of Surreptitious Entries Without Warrants

40) This request seeks documents relating to two official designations of the Weatherman investigation as a national security matter in 1976, three years after the conspiracy charged in the Indictment ended and two years after the last defendant, Mr. Miller, retired from the FBI. This discovery request should be denied as not material to any available defense. See Memorandum, Part II.

41) This request seeks all documents reflecting involvement or collaboration by the Weatherman Organization with any foreign power. This discovery request should be denied as not material to any available defense. See Memorandum, Part II.

42) This request seeks all documents reflecting any official classification of the Weatherman Organization as a national security threat. This discovery request should be denied as not material to any available defense. See Memorandum, Part II.

43) This request seeks all documents from seven government agencies reflecting that the Weatherman Organization had contacts with, traveled to, communicated with or received finances from any foreign country. This request also seeks nine specific documents or categories of documents relating to the foreign involvement of the Weatherman. This discovery request should be denied as not material to any available defense. See Memorandum, Part II.

"VII. Documents and Other Information Material to Defendant's [Gray's] Preparation of His Defense That the Indictment is Subject to Dismissal for Improper Conduct by the Government in Connection With the Grand Jury Proceedings"

44, 45 and 46) These requests seek to discover, as to each of the three grand juries that investigated some aspect of this case, the date each was sworn in, the date each subpoena (for testimony or documents) was issued by that grand jury, a list of every witness that testified before that grand jury, and a list of all testimony or documents transferred from one grand jury to another, together with the authorization for such transfers. The government has agreed to provide the dates that each grand jury was sworn in, first heard

testimony in this investigation and last met with regard to this investigation. The government has also agreed to provide the requested information concerning the transfer of documents or testimony from one grand jury to another. The requested discovery, beyond that agreed to by the government, is no more than a fishing expedition and should be denied. United States v. Haldeman, supra; United States v. Ross, supra.

47) The government's response to the issue of Mr. Skolnik's authority to sign the Indictment is contained in a memorandum on that subject which was filed earlier this week.

"VIII. Documents and Other Information Material to Defendant's [Gray's] Preparation of His Defense That the Indictment is Subject to Dismissal Due to Prejudicial PreIndictment Delay"

48) This request seeks documents, including witness statements, concerning the failure of FBI personnel, and one or more Department of Justice attorneys, to make full disclosure, in appropriate forums, of their knowledge of surreptitious entries. (See, Attorney General's press release, April 10, 1978.) This matter is presently the subject of ongoing internal inquiries by the FBI and Department of Justice. The government states, in good faith, that neither the matter referred to in the Attorney General's press release, nor any other evidence known to government counsel, indicates that any Department of Justice attorney was aware of surreptitious entries and searches conducted as part of the FBI Weatherman investigation prior to disclosure of that fact to the Civil Rights Division in the spring of 1976. Moreover, the requested discovery should be denied because the defendant has failed to allege actual prejudice brought about by any such alleged pre-indictment delay. See Memorandum, Part I(C).

49) The requested accounting of all relevant documents lost or destroyed since the time the Government became aware of the alleged facts resulting in this Indictment will be provided.

50) The government will provide the requested list of all persons who were witnesses or potential witnesses and have died since

the time the government first learned of the facts resulting in this Indictment. Government counsel know of no witnesses whose whereabouts are no longer known.

"IX. Documents and Other Information Material to Defendant's [Gray's] Preparation of His Defense That the Indictment is Subject to Dismissal for Improper Pre-Trial Publicity Emanating From Officials of the Department of Justice"

51, 52, 53, 54, 55, and 57) These requests all seek either public reports contained in the media concerning the investigation that resulted in this Indictment, or internal documents concerning dealings with media representatives which were not reported in the public media. The requests also seek internal documents concerning Justice Department communications relating to pretrial publicity. The only documents relevant to the issue of pretrial publicity are public media reports that are equally available to defense counsel. In any event, the pretrial publicity in this case has been insufficiently prejudicial to require any further inquiry beyond such public media reports. See Memorandum, Part I(D).

56) This request seeks "grand jury minutes reflecting questioning of witnesses by grand jurors or comments by grand jurors". The defense has failed to allege sufficient prejudicial pretrial publicity to warrant such a fishing expedition into the grand jury record. See Memorandum, Part I(D).

DEFENDANT FELT'S DISCOVERY REQUESTS

"A. General"

1-4) These four requests seek any "relevant" written or recorded statements in Justice Department or FBI files made during the 31 year period from 1942 to 1973 by Mr. Felt (Request #1), by co-defendants Miller and Gray (Request #2), by any co-conspirator 9/ (Request #3), and by "any other person" if the statement did or would have come to Mr. Felt's attention in the normal course of business (Request #4). "Relevant" is defined as relating to any foreign or domestic intelligence programs, any foreign or domestic terrorist activities, the Weatherman Organization, or the use of investigative techniques (not otherwise defined) in any of the previously listed investigations or "in any other investigations and programs involving, for example, fugitives or organized crime" (emphasis supplied).

The scope of this request quite literally boggles the mind. Mr. Felt is apparently seeking to discover every document relating to the three FBI divisions that have "investigative" responsibility and therefore utilize "any investigative technique." Specifically, in seeking any documents relating to foreign and domestic intelligence programs or terrorist activities, Mr. Felt is seeking to discover virtually every document generated by the FBI's Domestic Intelligence Division. The volume of such material is staggering. During the last three years of his tenure, virtually every document generated by the Domestic Intelligence Division or the two other investigative divisions would have been "routed to, disseminated to, or [its] contents or existence ... would normally have been known" to Mr. Felt. The government should not be required to produce such a massive amount of material, especially where there has been not even the slightest proffer of materiality. United States v. Haldeman, supra; United States v. Ross, supra. Of course, the government has agreed to make available all Weatherman files, and to that extent will voluntarily comply with these requests.

9/ The government has named thirty (30) co-conspirators in the indictment.

5) The government has already provided to his counsel a copy of defendant Felt's grand jury testimony as Rule 16 discovery. There are no other statements made by Mr. Felt to government investigators which the government intends to offer in its case-in-chief at trial.

6) The requested documents intended for use in the government's case-in-chief at trial have already been provided to defense counsel as Rule 16 discovery.

7) The requested scientific reports have already been provided to defense counsel as Rule 16 discovery.

8) The government did not employ electronic surveillance of any kind during the investigation which led to this Indictment.

9) The government has agreed to provide the requested materials concerning the fruits of all "searches and seizures" conducted during the investigation. No warrants were required for these seizures of FBI documents by FBI agents.

10 and 12) These requests seek all documents in FBI or Department of Justice files relating to all Weatherman fugitives referred to in paragraph 5 of the Indictment (Request #10), and to all relatives and acquaintances of Weatherman fugitives referred to in paragraph 6 and Overt Acts 6 through 32 of the Indictment. The government has agreed to make available all FBI Weatherman files. Absent a particularized request and proffer of materiality the government should not be required to search the files of the Department of Justice for documents that would not have been seen by Mr. Felt in the normal course of business. United States v. Haldeman, supra; United States v. Ross, supra; United States v. Conder, 423 F.2d 904 (6th Cir. 1970).

11) The government has already provided to defense counsel as Rule 16 discovery, the requested documents relating to Overt Acts 1 through 5 of the Indictment.

13) This request seeks to obtain the last known address and dates of service of every person serving as an Assistant Director of the FBI for the last 38 years. There has been no proffer of materiality for this request, and it is doubtful that such information concerning officials serving in the FBI twenty or thirty years ago could be material to the defense. United States v. Haldeman, supra; United States v. Ross, supra.

14) This request seeks documents, including tape recordings, reflecting all conversations of the President, and/or his staff, with Executive Department exmployees or Congress, concerning "terrorist activities in general and the Weatherman Organization in particular" during the last fourteen (14) years. This request should be denied as facially overbroad. United States v. Haldeman, supra; United States v. Ross, supra. Moreover, discovery as to "terrorist activities in general," unrelated to Weatherman, should be denied as not material to any available defense. See Memorandum, Part II. The government does not oppose an appropriate search of White House files. See Memorandum, Part I(E).

"B. Witnesses"

1) This request seeks the identities of co-conspirators, as well as any statements by co-conspirators. The identities of co-conspirators have been provided in the Bill of Particulars. Statements of co-conspirators are not per se discoverable. United States v. Pereevault, 490 F.2d 126 (2nd Cir. 1974). Any such statements that could be considered exculpatory will be provided as Brady material thirty (30) days before trial. See Memorandum, Part I(A).

2) Rule 16, as amended, intentionally excludes the disclosure of the requested witness lists. H.R. Conf. Rept. No. 94-414, 94th Cong. 1st Sess. 12 (1975). Witness statements are Jencks material which the government has agreed to provide thirty (30) days before trial. See Memorandum, Part I(A).

3) This request seeks the identities of, and any statements by, persons questioned during the investigation whom the government does not intend to call as witnesses at trial. Although not barred by the Jencks Act, such disclosure should not be ordered without a showing of materiality by the defense. United States v. Kearney, supra; United States v. Marshak, supra; 8 J. Moore, Federal Practice, ¶16.05[4] (2d ed. 1977).

4 and 5) These requests seek to discover any inducements (Request #4) or threats (Request #5) by the government to any trial witness or witness questioned during the investigation. As to trial witnesses, such inducements or threats are Brady material which the government has agreed to provide thirty (30) days before trial. See Memorandum, Part I(A). Such discovery as to witnesses not intended to be called at trial should not be ordered. United States v. Kearney, supra; United States v. Marshak, supra.

"C. The Weatherman Organization"

1) This request seeks the identities of all FBI officials in the chain-of-command relating to the Weatherman investigation, between "street agents" and the Director, for the last ten (10) years. Absent some showing of materiality this request should be denied. United States v. Haldeman, supra; United States v. Ross, supra. It should be noted that Mr. Felt was at the penultimate level of this chain-of-command during the period of the conspiracy.

2) The government has agreed to provide the requested materials concerning names, last known addresses, and criminal acts of all members of the Weatherman Organization, as part of its undertaking to make available all FBI Weatherman files. The government should not be required to search the files of the Department of Justice for documents that would not have been seen by Mr. Felt in the normal course of business. United States v. Ross, supra; United States v. Conder, supra.

3) The government has agreed to provide the requested materials concerning FBI efforts to investigate the Weatherman Organization and to locate and apprehend Weatherman fugitives, as part of its undertaking to make available all Weatherman files. Discovery of documents relating to efforts to locate Weatherman fugitives by "other law enforcement and intelligence agencies, federal, state, local and foreign" should be denied as overbroad, United States v. Haldeman, supra, and as not material to any available defense. See Memorandum, Part II. The government should not be required to search the files of the Department of Justice for documents that would not have been seen by Mr. Felt in the normal course of business. United States v. Ross, supra; United States v. Conder, supra.

4) This request seeks all documents reflecting involvement or collaboration by the Weatherman Organization with a foreign power. This discovery request should be denied as not material to any available defense. See Memorandum, Part II.

5) The government has agreed to provide the requested materials concerning any authorization, withdrawal of authorization or prohibition, by the President, Attorney General or any official of the Department of Justice, of the use in the Weatherman investigation of court-ordered electronic surveillance, warrantless electronic surveillance (including the placing and retrieving of microphones), warrantless entries and searches, mail covers, mail openings, informants and undercover agents, as part of its undertaking to make available all Weatherman files. An appropriate search will be made of Department of Justice files.

6) The government has agreed to provide the requested materials concerning any special training for FBI agents assigned to the Weatherman investigation, as part of its undertaking to make available all Weatherman files.

7) This request seeks public statements and testimony before Congressional committees during the last ten (10) years concerning the Weatherman Organization and efforts to locate and apprehend Weatherman fugitives. Public statements and Congressional testimony are equally available to defense counsel. Moreover, this discovery request should be denied as overbroad, United States v. Haldeman, supra, and as not material to any available defense. See Memorandum, Part II.

8) This request for any governmental designation during the last ten (10) years of the Weatherman Organization as a terrorist organization, national security threat, etc., should be denied as not material to any available defense. See Memorandum, Part II.

"D. The Defense of Selective Prosecution and Lack of Specific Criminal Intent"

1 and 2) These requests seek documents over the last 39 years relating to the FBI's "authority, responsibility and jurisdiction . . . in the fields of domestic and foreign intelligence, sabotage and espionage, subversive activities and terrorism" (Request #1); and to any delegation of the same within the FBI (Request #2). This request should be denied as overbroad. United States v. Haldeman, supra. Discovery as to selective prosecution should be denied because the defendant has failed to allege that his prosecution is based upon an invidious discrimination. See Memorandum, Part I(B). The requested discovery as to specific criminal intent should be denied as not material to any available defense. See Memorandum, Part II.

3) This request seeks documents relating to "authorization, withdrawal of authorization, ...by the President,...or... Attorney General... of the use in the conduct of any investigation by the FBI or any other government agency of electronic surveillance..., microphones..., entries..., mail covers..., mail openings..., informants and undercover agents" during the last 39 years. Any such documents relating to the Weatherman investigation will be provided as part of the government's undertaking to

make available all Weatherman files. To the extent that the request seeks documents relating to "any investigation" other than the Weatherman investigation, it should be denied as overbroad. United States v. Haldeman, supra. Discovery as to non-Weatherman investigations with regard to the issue of selective prosecution should be denied because the defendant has failed to allege that his prosecution was based upon an invidious discrimination. See Memorandum, Part I(B). The requested discovery as to non-Weatherman investigations with regard to the issue of specific criminal intent should be denied as not material to any available defense. See Memorandum, Part II.

4) This request is for documents showing that the "President, ...his staff or any employee of the Justice Department...had knowledge either generally or in specific instances of...FBI or other government agency...[use] of warrantless electronic surveillance...10/ microphones...entries...mail covers and mail openings" during the last thirty-nine (39) years. Any such documents reflecting such knowledge of the use of any of the listed techniques in the Weatherman investigation will be provided, as part of the government's undertaking to make available all Weatherman files. Discovery as to knowledge of the use of such techniques in non-Weatherman investigations should be denied as overbroad, United States v. Haldeman, supra, as not material to the issue of selective prosecution because the defendant has failed to allege that his prosecution was based upon an invidious discrimination, see Memorandum, Part I(B), and as not material to any available defense. See Memorandum, Part II.

10/ The Court may wish to note that over the last forty (40) years the Attorney General has regularly authorized electronic surveillance (including microphones since 1966) in national security cases. Cf. memoranda reproduced in Zweibon v. Mitchell, 516 F.2d 594, 673-675 (D.C. Cir. 1975) (en banc). Defendant's discovery request literally calls for the production of documents pertaining to every lawful authorization of electronic surveillance by the Attorney General in the last thirty-nine (39) years.

5 and 6) These requests seek documents showing that the Department of Justice learned that "any law enforcement officer in the United States" during the course of an official investigation used "any investigative technique or committed any act which, on its face, violated any person's rights" under the Fourth Amendment (Request #5) or the First, Fifth, Sixth or Fourteenth Amendments (Request #6) during the last 39 years. The overbreadth of this request alone requires that it be denied. United States v. Haldeman, supra. The requested discovery should also be denied as not material to the issue of selective prosecution because the defendant has failed to allege that his prosecution was based upon an invidious discrimination, see Memorandum, Part I(B), and as not material to any available defense. See Memorandum, Part II.

"E. Prejudicial Pre-Indictment Delay and Prejudicial Public Statements by Justice Department Officials"

1, 2, and 3) These requests seek documents showing when it was that anyone in the Department of Justice first learned of the use of warrantless entries in the FBI's Weatherman investigation (Request #1), and first concluded that sufficient evidence existed to recommend an indictment of Mr. Felt (Request #2), as well as documents showing the reason for the "delay" between the latter date and April 10, 1978, the date of the indictment of Mr. Felt. These requests should be denied because the defendant has failed to demonstrate any actual prejudice brought about by any such alleged pre-indictment delay. See Memorandum, Part I(C).

4) This request seeks documents reflecting the "reasons" for the placement of venue in the District of Columbia. This request should be denied because the "reasons" for the placement of venue are not material to the issue of pre-indictment delay as the defendant has failed to demonstrate any actual prejudice brought about by any such alleged pre-indictment delay, see Memorandum, Part I(C), and are not material to the issue of pretrial publicity because the publicity in this case has not been sufficiently prejudicial to warrant a factual inquiry. In any event, venue

is placed in the District of Columbia because the crime occurred in the District of Columbia. See Memorandum, Part I(D).

5) The government has already provided to defense counsel the requested testimony of, interview of, and letters from Mr. William C. Sullivan (now deceased). The additional requests for "relevant" 11/ statements between 1942 and 1973 by Mr. Sullivan, who retired from the FBI in October 1971, and for Mr. Sullivan's personnel file, should be denied as overbroad. United States v. Haldeman, supra. Moreover, the requested additonal discovery should be denied as not material to the issue of pre-indictment delay because the defendant has failed to allege any actual prejudice brought about by any such alleged pre-indictment delay. See Memorandum, Part I(C).

6) This request seeks documents reflecting any statements by Department of Justice employees to media representatives, from 1975 to the present, concerning the investigation leading to this Indictment. All public media reports are equally available to defense counsel; statements not reported in the public media are not material to the issue of pretrial publicity. See Memorandum, Part I(D).

"F. Specific Documents The Existence of Which is Known to Defendant W. Mark Felt"

1) The government has already provided to defense counsel the requested "Hoover memos" ordering a halt in 1966-67 to the use of surreptitious entries.

2) The government has agreed to provide the requested "Huston Report." The government has also agreed to provide any documents reflecting contacts with the FBI regarding the Weatherman Organization by the President's Foreign Intelligence Advisory Board and/or the Cabinet Committee to Combat Terrorism. Additional discovery concerning any such contacts regarding matters other than the Weatherman investigation should be denied as overbroad, United States v. Haldeman, supra, and as not material to any available defense. See Memorandum, Part II.

3) The government has agreed to provide the requested documents relating to the February 1973 redesignation of the "Domestic Intelligence Division" as the "Intelligence Division" of the FBI.

4) The government has agreed to provide the requested FBI documents relating to the Keith decision. The additional requested discovery of memoranda by Department of Justice attorneys, as well as the redesignation of domestic intelligence subjects as foreign inteligence subjects, should be denied as not material to any available defense. See Memorandum, Part II.

5 and 6) These requests seek two 1975 studies of FBI jurisdiction (Request #5) and authority (Request #6) in intelligence investigations. Discovery of these documents which were generated in the year after the last of these defendants, Mr. Miller, retired from the FBI, should be denied as not material to any available defense. See Memorandum, Part II.

7) The government has agreed to provide the requested "Haynes memo" to defense counsel.

8) This request seeks the "Chicago Report" concerning the foreign involvement of the Weatherman, which was prepared in 1976-77, three years after the end of the conspiracy alleged in the Indictment, and two years after the last of these defendants, Mr. Miller, retired from the FBI. This request should be denied as not material to any available defense. See Memorandum, Part II.

9) This request seeks all statements by former Assistant Director for the Domestic Intelligence Division (July 1970 through September 1971) Charles D. Brennan, including his grand jury testimony, personnel file and any documents authorized by him relevant to intelligence and terrorist investigations. This request should be denied as overbroad. United States v. Haldeman, supra. Jencks material and Brady material (if any) concerning Mr. Brennan will be made available thirty (30) days before trial. See Memorandum, Part I(A).

10) The government has already provided the requested "Ruckelshaus memorandum" to defense counsel.

11 and 12) The requested transcripts of the testimony of Attorney General Bell in United States v. Humphrey (Request #11), and of Attorney General Bell and Director Webster before the Senate in April 1978 concerning FBI jurisdiction (Request #12), are public documents equally available to defense counsel. The additional request, for documents supporting the Bell and Webster Senate testimony, should be denied as not material to any available defense. See Memorandum, Part II.

13 and 14) These requests seek documents concerning domestic and foreign intelligence programs and organized crime investigations, including 1961-62 memoranda between Deputy Attorney General White and the FBI relating to investigative techniques (Request #13) and documents reflecting after-the-fact authorization of wiretaps and microphone surveillances by Attorney General Katzenbach (Request #14). These discovery requests should be denied as not material to any available defense. See Memorandum, Part II.

15) This request seeks documents reflecting the use of warrantless wiretaps, microphones, surreptitious entries and mail openings in (a) FBI and IRS investigations of organized crime from 1957 to 1966, (b) the so-called "Kissinger wiretaps", (c) the so-called "Cointelpro" programs, and (d) investigations of the Communist and Socialist Workers Parties (without time limit). This request should be denied as overbroad, United States v. Haldeman, supra, and as not material to any available defense. See Memorandum, Part II.

DEFENDANT MILLER'S DISCOVERY REQUESTS

"Discovery Needed to Determine Whether an Offense was Committed and Whether Defendant Had the Requisite Criminal Intent"

1 and 2) These requests seek two 1975 studies of FBI jurisdiction (Request #1) and authority (Request #2) in intelligence investigations. Discovery of these documents, which were generated in the year after Mr. Miller retired from the FBI, should be denied as not material to any available defense. See Memorandum, Part II.

3) This request seeks all documents issued by the President or any government agency in the last 28 years which define, describe, or explain the term "surreptitious entry". This request should be denied as not material to any available defense. See Memorandum, Part II.

4 and 5) The government has already provided, or agreed to provide, the requested orders, directives, etc., concerning the "techniques of surreptitious entry". The defense protests two limits placed by the government on its undertaking to provide these documents. The first limits the discovery to the period when Mr. Miller was in the FBI. This limit should be enforced because it is only documents that Mr. Miller saw, or could have been aware of at the time, that could have influenced his intent. See Memorandum, Part II. The second limits the discovery to domestic cases. While the defense may argue that the Weatherman was, in fact, a foreign dominated group (a proposition which, in any event, the government contends is not material), it is clear that prior to and during the conspiracy the Weatherman organization was investigated by the FBI under a domestic heading (as opposed to those headings dealing with activities of hostile foreign intelligence services) and that the only directives applicable to the investigation were therefore those relating to domestic cases.

6) This request seeks documents showing all FBI surreptitious entries from 1950 to 1974, including documentation of any authorization by the President, Attorney General, Director of the FBI, other government official or court order. This request, which literally construed would call for the production of documentation of scores of trespassory microphones lawfully authorized by the Attorney General or by federal judges (18 U.S.C. §2516), should be denied as overbroad, United States v. Haldeman, supra, and as not material to any available defense. See Memorandum, Part II.

7) This request seeks "Department of Justice ... guidelines ... which set forth conditions for prosecution of FBI employees who utilize the technique of surreptitious entry." Government counsel are unaware of the existence of any such guidelines.

8, 9, and 10) These requests seek all documents in the last 28 years, from any government agency, which define terms such as "national security," "foreign intelligence," etc. (Request #8); which reflect the designation, approximately two years after Mr. Miller retirement, of the Weatherman investigation as "a national security matter" (Request #9); and which reflect any other designation of the Weatherman as a "national security threat" (Request #10). These requests for such governmental definitions, designations, or other labelings should be denied as not material to any available defense. See Memorandum, Part II.

11) This request seeks all documents from several government agencies reflecting that the Weatherman Organization had contacts with, traveled to, communicated with or received finances from any foreign country. This request also seeks ten specific documents or categories of documents relating to the foreign involvement of the Weatherman. This discovery request should be denied as not material to any available defense. See Memorandum, Part II.

12 and 13) These requests seek all orders, directives, etc., to or by the FBI in the last 25 years regarding investigative procedures in matters involving the national security, including electronic surveillance and entries into homes (Request #12), as well as any dissemination of such orders, directives, etc., to the FBI office that Mr. Miller was serving in at the time (Request #13). These requests should be denied as overbroad, United States v. Haldeman, supra, and as not material to any available defense. See Memorandum, Part II.

14) The government will make available the requested documents (if any) reflecting whether the President or Attorney General authorized any "Al Fatah" surreptitious entry or entries in September 1972.

"Additional Discovery Needed to Establish Defense of Approval of Higher Authority"

15) This request seeks all documents from six government agencies, in addition to the FBI, which concern plans to deal with the Weatherman Organization or other terrorist groups during the period 1969-1974. The government has agreed to make available the specifically requested "Huston Report," which deals, in part, with the use of surreptitious entries in the Weatherman investigation, as well as all FBI Weatherman files. Plans by other government agencies to deal with the Weatherman, as well as any governmental plans to deal with "other terrorist groups", are not material to any available defense. See Memorandum, Part II.

16) This request seeks documents showing communication between the White House and the Justice Department or FBI concerning plans to deal with the Weatherman or "other terrorist groups" from 1969 to 1974. The government has agreed to provide any such Department of Justice or FBI documents relating to the Weatherman investigation,

including the specifically requested "Haynes memorandum." To the extent that the request seeks documents relating to "other terrorist groups" it is both overbroad, United States v. Haldeman, supra, and not material to any available defense. See Memorandum, Part II. The Government does not oppose an appropriate search of White House files. See Memorandum, Part I(E).

17) This request seeks all tapes and transcripts of White House conversations in which the Weatherman Organization and/or "other terrorist groups" were discussed during the period January 20, 1969 through May 31, 1973. Discovery of such tapes and transcripts concerning "other terrorist groups" should be denied as not material to any available defense. See Memorandum, Part II. The government does not oppose an appropriate search of White House tapes and transcripts. See Memorandum, Part I(E). The government will produce any such tapes and transcripts, including all known conversations of any defendant, that are in the possession of government counsel.

18) This request seeks documents, including "statements of persons interviewed," which indicate that the surreptitious entries alleged in the Indictment were not authorized by officials in a position of authority higher than that of the defendants. The existence of such authorization would be a possible defense, and any evidence indicating that such authority existed would be Brady material. See Memorandum, Part II. Evidence that there was no such authorization is thus potentially part of the government's rebuttal case and is therefore not discoverable, other than in accordance with the Jencks Act. See Memorandum, Part I(A).

"Discovery Needed to Establish Prejudicial Pre-Indictment Delay"

19) This request seeks documents, including witness statements, concerning the failure of FBI personnel, and one or more Department of Justice attorneys, to make full disclosure, in appropriate forums, of their knowledge of surreptitious entries. (See, Attorney General's press release, April 10, 1978.) This matter is presently the subject of ongoing internal inquiries by the FBI and Department of Justice. The government states, in good faith, that neither the matter referred to in the Attorney General's press release, nor any other evidence known to government counsel, indicates that any Department of Justice attorney was aware of surreptitious entries and searches conducted as part of the FBI Weatherman investigation prior to disclosure of that fact to the Civil Rights Division in the spring of 1976. Moreover, the requested discovery should be denied because the defendant has failed to allege actual prejudice brought about by any such alleged pre-indictment delay. See Memorandum, Part I(C).

20) The government is willing to provide any such requested documents reflecting Director Hoover's personal wishes with regard to the means to be utilized to catch Weatherman fugitives. Government counsel assigned to this case, and knowledgeable FBI personnel working with government counsel, have been unable to locate any such documents. If any such documents are found, they will be provided to all defense counsel.

21) The government has agreed to provide the requested materials reflecting that the President or Attorney General, during the period 1950 through 1975,[12/] became aware of FBI surreptitious entries of the

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12/ The investigation that uncovered the surreptitious entries alleged in the Indictment and other similar surreptitious entries was ordered by the Attorney General in August 1975.

nature alleged in the Indictment (i.e., surreptitious entries accompanied by a search), but declined to order an investigation, rejected an investigation, or declined to prosecute any current or former FBI employees. Defense counsel's objection that discovery should include types of surreptitious entries other than of the nature alleged in the Indictment (e.g., court-ordered and Attorney General authorized entries to install a microphone) is without merit. See Opposition of the United States to Defendant Miller's Motion to Dismiss for Failure to State an Offense. See also Memorandum, Part II.

"Discovery Needed to Establish Discriminatory Prosecution"

22, 23 and 24) These requests seek lists of all matters over the last 28 years in which allegations of Fourth Amendment violation, through the use of surreptitious entry by law enforcement officials, have come to the attention of the Department of Justice (Request #22), or were investigated by the FBI (Request #23); and all documents relating to any decisions to decline prosecution with regard to such matters (Request #24). These requests should be denied because the defendant has failed to allege that his prosecution is based upon an invidious discrimination. See Memorandum, Part I(B).

25 and 26) These requests seek all documents from 1950 to 1974 which show, either directly or indirectly, that FBI agents conducted surreptitious entries, and which were sent either from FBI agents to government prosecutors (Request #25), or from FBI headquarters to the Department of Justice or other government agencies (Request #26). These requests should be denied because the defendant has failed to allege that his prosecution is based upon an invidious discrimination. See Memorandum, Part I(B).

CONCLUSION

For the reasons cited herein and set forth in more detail in the accompanying Memorandum, as well as for any additional reasons that may be advanced at the hearing on this matter, the government respectfully requests that the defendants' discovery requests, beyond those which have been agreed to by the government, be denied.

Respectfully submitted,

Barnet D. Skolnik
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing RESPONSE was hand-delivered, this 15th day of June, 1978, to Alan I Baron, Esquire, Frank, Bernstein, Conaway & Goldman, 1300 Mercantile Bank & Trust Building, 2 Hopkins Plaza, Baltimore, Maryland, defense counsel for Gray; Brian Gettings, Esquire, 1400 N. Uhle Street, Courthouse Square, Arlington, Virginia, defense counsel for Felt; and Thomas A. Kennelly, Esquire, Diuguid, Siegel & Kennelly, 1000 Connecticut Avenue, N.W., Washington, D.C., defense counsel for Miller.

FRANCIS J. MARTIN

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
	)	
V.	)	CRIMINAL NO. 78-000179
	)	
L. PATRICK GRAY, III W. MARK FELT and EDWARD S. MILLER	)	

MEMORANDUM IN SUPPORT OF THE RESPONSE OF THE UNITED STATES TO DEFENDANTS' MOTIONS FOR DISCOVERY AND INSPECTION

INTRODUCTION

Defendants Gray, Felt and Miller have filed discovery motions seeking all evidence material to their respective defenses, Rule 16(a)(1)(C), F.R. Crim. P., all evidence favorable to the defendants, Brady v. Maryland, 373 U.S. 83 (1963), and all witness statements discoverable pursuant to the Jencks Act, 18 U.S.C. §3500. The government has agreed to make all Jencks material and Brady material, if any, available 30 days before trial. (See discussion infra, Part I(A).) The government has already provided to the defendants their grand jury testimony, results of scientific tests, documents intended for use by the government as evidence in its case-in-chief, and documents understood by government counsel, in good faith, to be material to their defenses. Rule 16(a)(1)(A), (a)(1)(C) and (a)(1)(D). The government has also made available, or agreed to make available, extensive discovery of documents arguably material to the defendants' defenses, although such discovery is not clearly mandated by Rule 16.

The government's principal -- and mammoth -- undertaking in this regard has been to make available all FBI files relating to the Weatherman Organization and its members or supporters. On May 25, 1978, all defense counsel were advised that, initially, approximately four hundred and fifty (450) Weatherman files, consisting of approximately ninety thousand (90,000) pages, were available for immediate inspection. Included in these materials are all FBI files relating to the "relatives and acquaintances of Weatherman fugitives" referred to in the Indictment. In addition, the government has voluntarily agreed, in informal negotiations, to comply, in whole or in part, with eighty (80) of defendants' one hundred and fifty three (153) informal discovery requests (communicated to government counsel in early May by letters from each defense counsel), and has agreed in our accompanying Response 1/ to their formal discovery motions (filed on or about May 22) to comply, in whole or in part, with thirty five (35) of defendants' one hundred and twenty eight (128) formal discovery requests.

Government counsel are thus desirous that the Court understand that the government has demonstrated and manifested a willingness to provide discovery in this case which is absolutely extraordinary in its scope and size. Such discovery is in fact already well underway and will proceed with all deliberate speed to a conclusion at the earliest possible date. It is in that context, we respectfully submit, that the discovery requests now at issue before the Court -- which constitute only those which government counsel in good faith believe to be truly unreasonable and which we therefore oppose -- should be viewed.

1/ Formally, "Response of the United States to Defendants' Motions for Discovery and Inspection," hereinafter "Response".

The discovery requests now at issue involve the question of whether, as to a particular asserted legal claim or line of defense, the defendants have demonstrated a "colorable entitlement" such that discovery should be ordered. United States v. Murdock, 548 F.2d 599 (5th Cir. 1977). As discussed herein, infra, Parts I(B), I(C) and I(D)(and more fully in the government's oppositions -- filed June 12 -- to the defendants' motions to dismiss the Indictment for selective prosecution, pre-indictment delay and prejudicial pretrial publicity), the defendants have failed to demonstrate a "colorable entitlement" to discovery relating to those legal claims. As discussed fully herein, infra, Part II, the defendants have failed to demonstrate a "colorable entitlement" to discovery relating to any national security or mistake of law/mistake of fact defenses. In addition, the defendants have requested extensive discovery from the White House files of the Nixon administration, including tape recordings of presidential conversations. The government does not oppose an appropriate search of White House files, but has brought to the Court's attention (infra, Part I(E)) the unique circumstances surrounding any such discovery. Finally, a number of defendants' discovery requests are facially overbroad or seek materials that are simply not discoverable. The government's objections to such discovery requests are fully set out in our accompanying Response to defendants' discovery motions.

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TABLE OF AUTHORITIES

* Principal cases, relied upon.
1/Denials of certiorari are not noted in the text but are provided in the Table of Authorities for the Court's convenience.

Greenberg/Gray-2373

Greenberg/Gray-2375

Constitutional Provisions and Statutes

Regulations

Other Authorities

I.

A. Production of Jencks and Brady Materials

Pursuant to informal negotiations with defense counsel, the government has agreed to provide to the defendants all Jencks material and Brady material, if any, thirty (30) days before trial. Defendants, in various requests, 2/ have sought either immediate production of such materials or production sixty (60), as opposed to thirty (30), days before trial. 3/

With respect to the Jencks material, the government respectfully submits that its offer to produce Jencks material thirty days in advance of trial is eminently reasonable. As the Court is aware, the Jencks Act, 18 U.S.C. §3500, states:

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(Emphasis supplied)

Despite the absence of a requirement for the pretrial production of such material, the government has, in the interest of facilitating the task of defense counsel and of expediting the conduct of the trial itself, agreed to furnish such material a full month prior to trial.

2/ Gray requests 1 through 11 and 34, Felt requests B-1 through B-5, and F-9 and Miller request 18.
3/ Miller memorandum, p. 17.

This case is not a particularly lengthy or complex one. The government anticipates calling no more than thirty witnesses, and the Jencks material will not be overly voluminous. Furthermore, although not required to provide a witness list as such, the government has in fact identified virtually all its witnesses in the Rule 16 documentary material already furnished to the defense and in the Bill of Particulars. Most, if not all, of the witnesses are fully available to the defense; in fact, unlike the typical criminal case, most government witnesses (almost all of whom are present or former FBI officials) will doubtlessly be willing to submit--in many cases with enthusiasm -- to pretrial interviews by defense counsel. In sum, the instant case is not one in which the interests of justice require Jencks disclosure more than thirty days before trial.

With respect to material encompassed by Brady v. Maryland, supra, we note at the outset that we are unaware of the existence of any affirmatively exculpatory material. But we intend to furnish to defense counsel documentary manifestations of the potential testimony of any individual whose recollection of events could conceivably be argued to be capable of affecting the judgment of the jury.4/ For example, as to meetings where defendant Gray allegedly made inculpatory remarks (See Overt Acts #2 and 4), some attendees do not recall such remarks. Information regarding such attendees will be provided to defense counsel thirty (30) days before trial. Similarly, any information which reflects negatively on the credibility of government witnesses will be provided

4/ Under the recently established standard of United States v. Agurs, 427 U.S. 97, 108 (1976), rev'g 510 F.2d 1249 (D.C. Cir. 1975) the government's obligation to disclose arises only when the matter is sufficiently material to have affected the outcome of the trial.

thirty (30) days before trial. In light of the nature and volume of the material in question, thirty (30) days will constitute more than sufficient time for defense counsel to make full and meaningful use of the material. Nothing more is required.

B. Selective Prosecution

Defendants, in various requests, 5/ seek discovery of materials related to their claim of alleged selective or discriminatory prosecution. In order to raise an issue of selective prosecution, the defendants must show, at least prima facie: (1) that they have been singled out for prosecution while others similarly situated have not been prosecuted, and (2) that such selection was invidious -- i.e., based on such impermissible considerations as race, religion, or the desire to prevent the exercise of a constitutional right. United States v. Ojala, 544 F.2d 940, 943 (8th Cir. 1976).

The defendants have failed to meet either test. They have not alleged, much less made a prima facie showing, that there is either a policy or a practice of the federal government not to prosecute instances of the deliberate utilization by law enforcement authorities of illegal investigative techniques.6/ Even more clearly, the defendants have made no colorable claim that their prosecution is motivated by bias against them or bad faith. There is no

5/ Gray requests 19 through 25, Felt requests D-1 through D-6, Miller requests 22 through 26.

6/ Such prosecutions are, in fact, quite common. See e.g., United States v. Kelly, 556 F.2d 257 (5th Cir. 1977); United States v. Schilleci, 545 F.2d 519 (5th Cir. 1977); United States v. McClean, 528 F.2d 1250 (2d Cir. 1976); United States v. Harpel, 493 F.2d 346 (10th Cir. 1974).

showing, indeed there is no proffer, of an invidious basis for the prosecution.

It is also clear that defendants are not entitled to discovery to bolster their claim. In order to be allowed such discovery, a defendant must prove a "colorable entitlement." United States v. Murdock, supra; United States v. Oaks, 508 F.2d 1403 (9th Cir. 1974), aff'd following remand, 527 F.2d 937, (9th Cir. 1975), cert. denied, 426 U.S. 952 (1976); United States v. Berrios, 501 F.2d 1207 (2d Cir. 1974). No such showing of a "colorable entitlement" has here been made. Defendants' requests for discovery with respect to this issue should therefore be denied.7/

C. Pre-Indictment Delay

Defendants, in various requests,8/ seek discovery of materials related to their claim of alleged pre-indictment delay. The government has already furnished, or agreed to furnish, materials that are related to the issue of prejudice due to pre-indictment "delay" -- i.e., an accounting of all documents destroyed; a list of any witnesses or potential witnesses who may have died; all relevant recorded statements and correspondence from the late William C. Sullivan; and any materials reflecting that the President or Attorney General became aware of surreptitious entries of the nature alleged in the Indictment. Other requested materials have been denied on the ground that they are not relevant to the issue of prejudice.

7/ A fuller exposition of the law on this subject is to be found in the "Opposition of the United States to (1) Defendant Gray's 'Motion to Dismiss Indictment on Grounds of Selective Prosecution' and (2) Defendant Miller's 'Motion to Dismiss the Indictment Due to Discriminatory Prosecution'", filed on June 12.

8/ Gray request 48, Felt requests E-1 through E-5 and Miller request 19.

The leading case in this area is United States v. Lovasco, 431 U.S. 783 (1977), which involved an 18-month pre-indictment delay during which two potentially material witnesses for the defendant had died. In determining that the defendant's due process rights had not been violated, the Court rejected the contention that due process bars prosecution whenever a defendant suffers prejudice as a result of pre-indictment delay. The Court held instead that proof of actual prejudice makes a due process claim ripe for adjudication, but not automatically valid. 431 U.S. at 789. Furthermore, the inquiry must consider the reasons for the delay as well as the prejudice to the accused; the action complained of must, to justify dismissal of the prosecution, violate "those 'fundamental conceptions of justice which lie at the base of our civil and political institutions'. . .and which define 'the community's sense of fair play and decency'...." 431 U.S. at 790.

Investigation of the activities that are the subject of this Indictment commenced in the summer of 1976 and continued until return of the Indictment on April 10, 1978. A substantial volume of activities other than those ultimately indicted was concurrently investigated by the prosecutors and grand jurors, and hundreds of witnesses were brought before three separate grand juries. Once the evidence had been accumulated and assimilated, the strength of the case was carefully assessed, up to and including the highest levels of the Department of Justice.

Defendants fail to show how they have been prejudiced by such "delay." When measured by the Lovasco standard, it is clear that the deliberate pace of the investigation which led to the Indictment in this case not only did not violate,

but in fact adhered to, "those fundamental conceptions of justice which. . .define the community's sense of fair play and decency." Lovasco, supra, 431 U.S. at 790.

Moreover, much of the requested discovery would impinge upon currently ongoing FBI and Department of Justice internal inquiries. With respect to those inquiries -- concerning allegations of FBI failure to disclose the fact of illegal surreptitious entries to inquiring agencies and of knowledge of such entries by one or more employees of the Department of Justice (other than FBI) -- government counsel, in good faith, wish to advise this Court that there is to our knowledge no evidence to indicate that any employee of the Department of Justice (other than FBI) had knowledge, prior to April 1976, of the utilization of illegal investigative techniques in the FBI's investigation of the Weatherman.

Because the defendants have failed to allege any predicate that would warrant a factual inquiry, the government respectfully submits that the requested discovery on this issue should be denied. 9/

D. Pretrial Publicity

Defendants, in various requests, 10/ seek discovery of materials related to their claim of alleged prejudicial pretrial publicity, including certain media reports, press releases, transcripts of public statements, internal governmental memoranda on the subject of pretrial publicity, and grand jury minutes reflecting comments of the grand jurors.

9/ A fuller exposition of this issue is to be found in the "Opposition of the United States to Defendants' Motion to Dismiss the Indictment on Grounds of Pre-Indictment Delay", filed on June 12.

10/ Gray requests 51 through 57 and Felt requests E-4 and E-6.

The only documents relevant to the question of pretrial publicity are press and media reports, which are equally available to defense counsel. Indeed, defendant Gray's Motion to Dismiss Indictment on Grounds of Prejudicial Pretrial Publicity contains twenty-nine (29) exhibits of newspaper articles concerning the investigation, indictment and arraignment. Any internal Department of Justice memoranda, "notations of meetings or personal or telephone conversations with media representatives by the Attorney General of the United States or personnel of the Department of Justice" (Gray request # 52), and the "substance of each statement to or in the presence of any press, ratio[sic] or television representative" (Gray request # 54) are irrelevant to the issue of prejudicial pretrial publicity, unless such statement or conversation was reported in the public media. In that latter event, the public media reports are obviously available to defense counsel.

The publicity generated by this investigation is insufficient to require any further inquiry on this issue at this time. It is settled law in this Circuit that the proper method for determining whether or not an impartial jury can be selected is voir dire examination. United States v. Ehrlichman, 546 F.2d 910, 916 & n. 8 (D.C. Cir. 1976); United States v. Haldeman, 559 F.2d 31, 63-71 (D.C. Cir. 1976); United States v. Chapin, 515 F.2d 1274, 1286 & n. 7 (D.C. Cir. 1975). The pretrial publicity in this case has been far less severe in quantity and in quality than that in several recent cases in which pre-voir dire relief has been rejected, e.g., United States v. Haldeman, supra; Calley v. Callaway, 519 F.2d 184, 209 (5th Cir. 1975).

Furthermore, unlike many previous cases subjected to pretrial publicity, the publicity in this case has been almost entirely factual and straightforward. It is important to note that United States v. Haldeman, supra, involved Watergate conspiracy publicity that was not only "extraordinarily extensive", 559 F.2d at 61, n. 34, but also, in part, "hostile in tone and accusatory in nature". 559 F.2d at 61. The Court, in its factual analysis of the publicity concerning the uniquely prominent episode there at issue, made a point of stating that:

> The overwhelming bulk of the material submitted. . .consists of straightforward, unemotional factual accounts of events and of the progress of official and unofficial investigations. Id. at 61.

A significant number of the articles submitted to this Court by defendant Gray are in fact not at all hostile, but rather favorable to him.

Finally, more than two-thirds of the articles submitted by Gray are already more than eight months old, having appeared in, or long before, October 1977. Even the articles generated at the time of indictment and arraignment will be stale by the time of trial.

In short, the publicity with respect to this case does not begin to approach the level that would warrant any further inquiry at this time. Because the defendants have failed to make even a colorable claim of the kind of prejudicial pretrial publicity that would justify pre-voir dire relief, their requests for discovery concerning pretrial publicity should be denied.11/

11/ A fuller exposition of the law on this subject is contained in the "Opposition of the United States to Defendant Gray's (1) 'Motion to Dismiss Indictment on Grounds of Prejudicial Pretrial Publicity' and (2) 'Motion for Change of Venue Pursuant to Rule 21 of the Federal Rules of Criminal Procedure'", filed on June 12.

E. White House Files

The defendants, in various requests[12] seek to obtain discovery of materials contained in the White House files of the administration of former President Nixon.[13] These requests seek documents from the files of former President Nixon and his staff, as well as tapes and transcripts of presidential conversations. Where the government in this case opposes discovery requests which seek documents from various sources, including the White House, such opposition is based upon considerations of relevance and materiality and not upon the fact that it is White House documents that are being sought. Indeed, with respect to the possible existence of higher authorization for the searches alleged in the Indictment, an appropriate search of White House files may well be reasonable. But questions of logistics arise.

After the resignation of former President Nixon, the files of his administration were placed in the Archives, a branch of the General Services Administration (GSA). Control of these files was the subject of extensive litigation. See Nixon v. Sampson, 389 F. Supp. 107 (D.D.C. 1975) and 437 F. Supp. 654 (D.D.C. 1977). Thereafter Congress enacted the Presidential Recordings and Materials Preservation Act (the Act), 44 U.S.C. §2107 (Supp. 1977), which mandated that materials of the Nixon presidency be taken

12/Gray requests 31, 32 and 33; Felt requests A-14 and F-2; and Miller requests 15, 16 and 17 or portions thereof.

13/In his request A-14 defendant Felt seeks access to records of presidential conversations over the last fourteen (14) years. The availability of non-Nixon administration files need not be addressed because it is clear that, to the extent this request seeks such files, it is facially overbroad. United States v. Haldeman, supra.

into the complete possession and control of the Administrator of General Services (the Administrator). The facial constitutionality of the Act was upheld in Nixon v. Administrator of General Services, 433 U.S. 425 (1977). The Act directs that the Administrator process the Nixon materials, provide special and public access to the materials and return purely private materials to Mr. Nixon. (§§ 102, 104 and 104(a)(7)). The Administrator has issued special access[14] and public access[15] regulations, which are both under constitutional attack by Mr. Nixon, Nixon v. Solomon, C.A. No. 77-1395 (D.D.C.) Pending a final determination in Nixon v. Solomon, the special access provisions permit, subject to limitations, access by Mr. Nixon, by the executive branch of government[16], and by others "for use in any judicial proceeding" or pursuant to "court subpoena or other legal process". §102(b), and see 41 C.F.R. §105-63.303.

It is clear that Nixon administration materials may be reached by an order of this Court. However, there are at least two major limitations on access to these materials. The first is a legal limitation; the second, a practical one.

First, whenever special access under the regulations is requested, the Archivist is required to give notice to former President Nixon, who may consent or object. If his objection if overruled, Mr. Nixon is then given a brief time in which to seek an injunction or to intervene in the litigation that has given rise to the request. In addition,

14/ 41 C.F.R. §105-63.101ff (issued August 12, 1977 and supplemented October 11, 1977)
15/ 41 C.F.R. §105-63.401ff (issued December 16, 1977)
16/ Provision for executive branch access is necessary because GSA alone has custody of the materials.

the government (i.e., not the GSA) has the same right to object, to seek to enjoin production, or to intervene in the underlying litigation.17/ In a criminal litigation, the party seeking discovery, when faced with any such objection, must make a showing of particularized need for specific materials in order to overcome the presumptively privileged nature of presidential files. United States v. Nixon, 418 U.S. 683 (1974); United States v. Haldeman, 559 F.2d 31, 76 (D.C. Cir. 1976). Under the high standards of need and particularization mandated by these cases, it is clear that the defendants' instant requests for discovery of White House files are facially overbroad and should therefore be denied. United States v. Haldeman, supra, 559 F.2d at 75; United States v. Ross, 511 F.2d 757 (5th Cir. 1975).

The second limitation on discovery of White House files is the practical difficulty encountered in seeking to access some forty-two (42) million pages of documents and eight hundred and eighty (880) tape recordings, portions of only a handful of which have been transcribed or even indexed. See Nixon v. Administrator of General Services, supra, 433 U.S. at 430. For example, complying with Miller discovery request number 17 (for all portions of taped conversations in which the Weatherman Organization or other terrorist groups18/ were discussed between 1969 and 197419/)would require

17/ The government does not contemplate invoking, with regard to discovery in this case, the privileged nature of presidential communications. However, it is clear that "military, diplomatic or sensitive national security secrets" are also subject to privilege; it is possible that the government would, if necessary in this case, invoke that privilege. United States v. Nixon, 418 U.S. 683, 706 (1974).

18/For reasons discussed in Part II of this Memorandum, the government opposes any search with regard to "other terrorist groups." However, eliminating "other terrorist groups" from this request would not lessen the burden in searching the White House tapes.

19/ The White House taping system was in operation from approximately May 1971 through July 1973.

a search by the Archivist that would take at least one year. There would be a similar burden in complying with many of the defendants' other requests for White House documents as well. The government strongly opposes the substantial delay of this case which would inevitably follow from the granting of such discovery requests, especially since most of those requests are so obviously overbroad.

The government does not, however, oppose discovery per se of White House tapes and documents. Government counsel familiar with the process of gaining access to such materials in the context of a criminal investigation wish to advise the Court that, in the absence of objection from Mr. Nixon,20/ a reasonable discovery procedure as to White House files is possible.21/ However, any such procedure must be bottomed on a good faith effort by the defendants to limit and particularize their requests. While it may not be necessary in that context for the defendants to meet the heavy burden imposed by United States v. Nixon, supra, it is respectfully submitted that the Court should, as a matter of due process in dealing with presidential files, require a strong showing of materiality and particularization.

20/ Mr. Nixon has indicated a willingness to be of assistance to the defendants in this case, and therefore would presumably not object to a reasonable search. However, the present discovery requests are overbroad and unreasonable; objection by Mr. Nixon would be warranted. If such objection were interposed, the defendants would be required to meet the standards of United States v. Nixon, supra, which the present discovery requests do not even approach.

21/ A reasonable search of White House tapes and documents may proceed by first examining available inventories of files, then selecting clearly pertinent files for review by the Archivist. Once those files have been reviewed and relevant documents have been extracted, the defendants, on the basis of the extracted documents, may seek to have some additional files reviewed. If any of the documents were to indicate that there was a clearly material and plainly identifiable conversation with the President, then the conversation (if taped) could be reviewed and, if relevant, made available to the defendants.

The government therefore requests that, preliminarily, there be no discovery ordered by the Court with regard to White House tapes and documents. The government will request all defense counsel to meet as soon as possible with government counsel and with representatives of GSA, as well as, at an appropriate time, with counsel for Mr. Nixon, to discuss the practicalities of access to White House tapes and documents. Should a satisfactory resolution not be reached, the government would file with the Court an affidavit by the Archivist setting forth the practical difficulties in complying with the specific defense discovery requests, as well as the amount of time that would be needed to comply with those requests. Further proceedings would then be at the Court's behest. Government counsel hope that such further involvement of the Court in the matter will not prove necessary, but we of course cannot control the degree to which the defendants may or may not be willing to narrow their requests.

II.

Defendants Felt and Miller seek certain discovery as bearing on the issue of "criminal intent" (Miller Memorandum, p.1) or "specific criminal intent" (Felt Motion, p.6). Defendant Gray does not seek documents under that heading but does seek some of the same documents under headings relating to the possibility of higher authorization and to possible justification for warrantless searches (Gray Motion, p.7-13). Although both Felt and Miller refer generally to the issue of intent, it would appear that three separate issues are involved with respect to the requirement in a Section 241 prosecution that the government prove "specific intent". Screws v. United States, 325 U.S. 91 (1945).

The first issue is raised by Miller's contention[22] that the "standards of illegality" concerning surreptitious entries were so vague that he was operating in a "legal no-mans land" and that he should be afforded discovery as to various items concerning FBI policy on surreptitious entry, in order to enable him to determine whether or not he "had notice" of the "standards of illegality."[23] The second and third issues are interrelated. The second issue is raised by Miller's "assertion that the Weatherman investigation was a national security investigation

22/The discovery motions of defendants Gray and Felt do not set out any analysis of the facts and law with regard to discovery relating to specific intent. Defendant Miller does set forth at least some such analysis; accordingly, the government will use that analysis to structure its response herein. Many of the items requested as discovery on specific intent by Miller are also requested by Gray and Felt and, for the reasons cited herein, should also be denied.

23/Miller Memorandum p. 3 and 7.

with foreign overtones and therefore warrantless surveillance was legal."[24]; this in turn relates to the third issue, which is raised by the assertion that a defense of "good faith and reasonable reliance on apparent authority" is available to Miller and that discovery, therefore, tending to show the "foreign overtones" that would (according to Miller's argument) make warrantless surveillance legal should be afforded to him so as to buttress his proof regarding the reasonableness of his reliance.[25]

The law as to Section 241's requirement of "specific intent", and its applicability to each of these three issues, is set out below.

A. Screws v. United States

The seminal case concerning the requirement of proof of "specific intent" in a prosecution for violation of Constitutional rights is Screws v. United States, supra. In that case the Supreme Court faced a challenge to a civil rights prosecution on the basis that the statute's prohibition against the deprivation of any right protected by the Constitution or laws of the United States was void for vagueness.[26] The Court held that the statute's requirement of a "willfull" deprivation of rights engrafts onto the statute a "specific intent" requirement that serves to eliminate any problem of vagueness, as well as to exclude prosecution of offenses of purely local concern. 325 U.S. at 105. Thus, under Screws the government is required to prove (1) that the Constitutional right at issue is clearly delineated and plainly applicable under the circumstances of the case and (2) that the defendant

24/Id. p.9

25/Id. p.9

26/In Screws the prosecution was under Section 242, the substantive counterpart to the Section 241 conspiracy charged in this case. The Screws specific intent doctrine is equally applicable to a Section 241 prosecution. United States v. Ehrlichman, 546 F.2d 910, 921 (D.C. Cir. 1976); United States v. Price, 383 U.S. 787, 806 (1966); United States v. Guest, 383 U.S. 745, 753-754 (1966).

acted with the particular purpose of depriving the victim of that right rather than for purely personal reasons. This latter requirement is clearly met in the present case, since there is no dispute about the fact that the surreptitious entries and searches alleged in the Indictment were conducted by the FBI for a governmental purpose, rather than for purely personal gain. See United States v. Ehrlichman, 546 F.2d 910, 928 (D.C. Cir. 1976).

B. Notice of the "Standards of Illegality"

On the question of intent, defendant Miller states that:

> We have found no statute which prohibits the technique of surreptitious entry...In the absence of a statute, we must look elsewhere to determine standards of conduct.[27]

Defendant Miller then proceeds to make various discovery requests (Miller Requests 1-7) which seek FBI position papers, definitions and policy statements concerning surreptitious entries; records of all FBI surreptitious entries for twenty-four (24) years; and guidelines concerning the prosecution of FBI agents who conduct surreptitious entries.[28] These materials are requested, argues Miller, in order to enable him to determine whether or not he had "notice" of the "standards of illegality" in what he characterizes as a "legal no-man's land".

Miller's argument misapprehends the law as to specific intent. In essence, he purports to wish to show through the discovered materials that the law as to surreptitious entry and/or his awareness (notice) of that law was so unclear that he could not form the requisite criminal (specific) intent. But this is not a factual issue. The question of whether the right at issue, (that is, the right allegedly violated by the indicted conduct) was a clearly delineated and plainly applicable Constitutional right is "a purely legal determination." Ehrlichman, supra,

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27/ Id. p.2

28/ These requests are duplicative of, or similar in nature to, Felt requests #C-7, C-8, D-1, D-2, F-5, F-6, F-11, F-12, F-13, F-14 and F-15, or portions thereof.

546 F.2d at 921. In no way could discovery of the requested factual material bear on the "purely legal determination" of whether or not it was a clearly delineated and plainly applicable Constitutional right which was violated by the conduct alleged in the Indictment. Moreover, Miller's contention that he should be permitted the requested discovery in order to enable him to show his lack of awareness (notice) of the alleged "standards of illegality" is in error, since it is clear that "[T]here is no requirement under Section 241 that a defendant recognize the unlawfulness of his acts." Id. at 922. It has long been clear that to violate Section 241 the defendant need not have been thinking in Constitutional terms. Screws v. United States, supra, 325 U.S. at 106; United States v. Guest, 383 U.S. 745, 753-754 (1966); see also Wood v. Strickland, 420 U.S. 308 (1975). Accordingly, Miller discovery requests 1 through 7, and the similar requests of defendants Gray and Felt[29/] should be denied.

C. The Legality of the Searches

Defendants Gray and Miller both seek discovery for the stated purpose of trying to establish that, in the Weatherman investigation surreptitious entries without warrant were "justified" (Gray Motion, p.11) or "legal" (Miller Memorandum, p.9) or if not legal, that the defendants' mistaken belief in their legality was reasonable (Miller Memorandum, p. 9).[30/]

The searches alleged in the Indictment were clearly illegal. The Supreme Court has stated that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." United States v. United States District Court, 407

29/ See footnote 28, supra.

30/ Defendant Felt seeks some of the same documents, although not under these headings. The avilability to the defendants in this case of a defense based upon an asserted reasonable belief in the legality of the indicted conduct is discussed infra at Parts II(D) and II(C).

U.S. 297, 313 (1972) [hereinafter "Keith"].[31] Defendant Miller, arguing in support of his requests for discovery of various materials in the area of national security, cites a series of wiretapping cases in which the government has defended the legality of warrantless electronic surveillance in matters of national security.[32] Miller goes on to state that "the Weatherman organization involved 'foreign agents or collaborators with foreign powers'; the test set forth in Ehrlichman" for justifying a warrantless search.[33] The dispositive flaw in the analogy which Miller thus attempts to draw is that whereas specific case-by-case authorization by the President or Attorney General is an essential prerequisite to invocation of any exception to the warrant requirement for national security searches, there was no such authorization in the instant case -- absolutely none. Each case cited by Miller[34] involved warrantless electronic surveillance conducted with the prior written approval of the Attorney General, who "considered the requirements of national security and authorized electronic surveillance as reasonable". Katz v. United States, 389 U.S. 347, 364 (1967) (White, J., concurring). Moreover, Ehrlichman itself stands squarely for the proposition that a national security justification for a warrantless search (such as an allegation of unlawful collaboration with a foreign power), no matter how clear, does not validate the search unless there is

31/The warrantless search of a home, with certain well defined and historic exceptions, is per se unreasonable and plainly violates the Fourth Amendment. Coolidge v. New Hampshire, 403 U.S. 443, 449-78 (1971); Katz v. United States, 389 U.S. 347, 357, (1967); Johnson v. United States, 333 U.S. 10, 14 (1948); Agnello v. United States, 269 U.S. 20, 33 (1925).

32/For purposes of the present analysis, no distinction need be drawn between warrantless physical searches and warrantless electronic surveillance. Barker-Martinez, infra, 546 F.2d at 950. But see, Ehrlichman, supra, 546 F.2d at 933-940 (Leventhal, J., concurring).

33/Miller Memorandum, p. 9.

34/Zweibon v. Mitchell, 363 F. Supp. 936 (D.D.C. 1973) and Burkart v. Saxbe, 23 Cr. L.R. 2104 (3/21/78, E.D. Pa).

"specific approval by the President or Attorney General", Id. at 923. Such approval constitutes a so-called "Chief Executive warrant", which in matters relating to national security may be used as a substitute for judicial warrant. Id. at 927. In the present case (as in Ehrlichman) there is and will be no dispute regarding the fact that none of the nine surreptitious entries and searches alleged in the Indictment[35] was conducted pursuant to any "specific approval by the President or Attorney General". The total absence of that clear prerequisite to legality renders unqualifiedly illegal the searches involved in this case.

The documents which Miller requests relate to definitions of terms such as "national security" and "foreign intelligence", official designations of the Weatherman as a "national security matter" (including two such specific designations made four years after the conspiracy terminated and two years after Miller retired), evidence (including ten specific documents) showing the relationship of the Weatherman with foreign powers and policy statements concerning procedures in national security investigations. These discovery requests are similar to ones made by Ehrlichman which were denied by Judge Gesell,[36] a ruling later affirmed by the Court of Appeals.[37] As in Ehrlichman, where the discovery requests were for materials showing that the Ellsberg investigation was a national security matter in which warrantless searches might be legal, the requests here are intended to aid the defendants in their effort to establish a sufficient national security predicate for the argument that warrantless searches were legal in the Weatherman investigation. After the general proposition would

35/See Overt Acts 7, 11, 15, 17, 19, 21, 24, 29, and 31.

36/United States v. Ehrlichman, 376 F. Supp. 29 (D.D.C. 1974).

37/Ehrlichman, supra, 546 F.2d at 925.

come the effort to establish that there may have been, in traditional terminology, probable cause (referred to in this context as "national security justification") for each search.

But the entire effort is beside the point: just as it is clear in the general setting that the existence of probable cause does not excuse the failure to obtain a judicial warrant, it is equally clear in the national security setting that the existence of "national security justification" does not excuse the failure to obtain Presidential or Attorney General authorization.[38] Ehrlichman, supra; United States v. Coplon, 185 F.2d 629 (2nd Cir. 1950); Abel v. United States, 362 U.S. 217 (1960).

As it is undisputed that there was never any specific Presidential or Attorney General authorization for the searches charged in the present Indictment, any discovery intended to help the defense establish that a national security predicate existed such that Attorney General authorization could have been, -- but was not -- sought, is of no potential relevance to proper litigation of this case and should therefore be denied. Accordingly Miller discovery requests 8 through 13, Gray discovery requests 28, 40, 41, 42 and 43 and Felt discovery requests C-4 and F-8 should be denied.

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[38] That is true even where the national security predicate is abundantly clear, as would not be the case here even if the defense effort to establish the Weatherman's "foreign connections" were given the benefit of every doubt.

D. The Defendants' Asserted Mistaken Belief as to the Legality of the Searches

The discovery requested by Miller (as well as by Gray and Felt) which seeks to establish a national security predicate for the searches alleged in the Indictment is sought not only in an effort to establish alleged legality, but also in an effort to establish evidentiary support for Miller's asserted reasonable reliance on higher authority. Miller contends that discovery tending to show that a sufficient national security predicate existed, such that Attorney General authorization for the individual Weatherman searches could have been obtained, would also support the reasonableness of his asserted reliance upon what he now asserts he understood to be the assurances of those in higher authority (presumably Gray) that legally effective authorization had been obtained. Using the probable cause analogy, the contention is comparable to that of a police officer who seeks to show that his asserted reliance on the assurances of those in higher authority that a warrant for a given search had been obtained was reasonable because he, in fact, knew that probable cause existed sufficient for the procurement of a valid warrant. (Such asserted reliance would of course be unreasonable if he, in fact, knew that there existed no such probable cause and that a valid warrant therefore could not be obtained.) That argument appears facially to support Miller's requests for discovery seeking to establish a national security predicate.

But again there is a dispositive flaw: Miller in fact knew that no specific Presidential or Attorney General authorization -- absolutely none -- was sought, much less obtained, for any of the searches (relevant to this case) which he authorized.[39/]

39/The same is true of Felt, who can be expected to rely upon the same augument already advanced by Miller.

The facts as to the authorization by defendants Felt and Miller of the individual searches involved in this case are not in dispute. Indeed, the vast bulk of the government's factual allegations in this case are not disputed. Accordingly, the Court, in its analysis of the defendants' various discovery requests, may find helpful the following factual summary[40]/

In May 1972, defendant Gray, immediately after the death of Director J. Edgar Hoover, was appointed Acting Director of the FBI. He remained in that position until his resignation in late April 1973. Throughout that period, defendant Felt was Acting Associate Director, the number two position in the FBI, and defendant Miller was the Assistant Director for (that is, in charge of) the Domestic Intelligence Division, which had overall supervision of (among other things) the FBI's Weatherman investigation. According to Felt and Miller, Gray in the summer of 1972 gave them generic authorization to use surreptitious entries and searches in the conduct of the Weatherman investigation. Gray flatly denies having given anyone such authorization. Regardless of which factual assertion is accurate on that point, it is not disputed that, beginning in the late fall or early winter of 1972 Miller began authorizing, in each instance with the explicit concurrence of Felt, individual surreptitious entries in the FBI's investigation of the Weatherman.[41]/ It is undisputed that these authorizations were given by Miller and Felt alone, with no effort

40/This factual summary is set forth, in good faith, as in intended aid to the Court's consideration of defendants' motions for discovery. It is not intended as a formal particularization of the Indictment and should not be construed as a government commitment in limitation of its proof.

41/These Weatherman surreptitious entries and searches were carried out by "street agents" assigned to the FBI's New York and Newark field offices. It is these street agents, acting pursuant to oral authorization coming down to them through the chain-of-command, who are the "foot soldiers" acting in reliance upon apparent higher authority. See United States v. Barker, 546 F.2d 940 (D.C. Cir. 1976). It was partially in recognition of that reliance, and of the great "gap" in the FBI between the authority of a street agent and that of an Assistant Director, that the Department of Justice decided to decline prosecution of those "foot soldiers". Similarly, it was the gap between field supervisor, the next level above street agent, and Assistant Director that governed the finding, for discovery purposes, of the potential availability to a field supervisor of the defense of reliance upon apparent authority, United States v. Kearney, 436 F. Supp. 1108 (S.D.N.Y. 1977), and eventually led to the government's decision to dismiss the Kearney case.

whatever to seek specific authorization from the President or the Attorney General,[42] or from Gray or anyone else who might in turn have sought authorization from the President or the Attorney General -- in short, the authorizations for individual surreptitious entries and searches were given by defendants Felt and Miller with no effort of any kind on their parts to seek the specific authorization of anyone. One who knows that no such authorization has been sought, knows that no such authorization has been obtained. Thus, it can be unqualifiedly stated, as the inevitable logical consequence of facts which are undisputed, that defendants Felt and Miller knew that no specific Presidential or Attorney General authorization had been obtained for any of the searches relevant to this case.

In light of the above, it becomes necessary to inquire as to how it is that Felt and Miller purport to continue to assert the defense of good faith reliance upon apparent authority. Reading between the lines, it appears that the gloss which they would apply to that defense, in their effort to have it reach the facts and circumstances of this case, runs as follows: the Weatherman Organization was in some way in collaboration with a foreign power,[43] and therefore warrantless searches in the FBI's Weatherman investigation could be authorized; Gray gave generic authorization to conduct suc

42/Then Attorney General Kleindienst had discontinued two Weatherman electronic surveillances as a direct result of the Supreme Court's June 1972 decision in Keith. Whether the Attorney General would have authorized any of the warrantless searches alleged in the present Indictment cannot of course be definitively known, because he was never consulted about any of them. His actions at the time of Keith, however, can surely be said to have at least put the defendants on notice of what can fairly be characterized as a strong presumption on the part of the Attorney General against any future authorization of warrantless surveillance, of any kind, in the Weatherman investigation.

43/It is axiomatic that in any defense based upon an asserted good faith belief that the alleged wrongful conduct was lawful, the defendant must have subjectively believed the facts to have been such that, if true, would have rendered his conduct lawful. Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 456 F.2d 1339, 1348 (2nd Cir. 1972). In this regard, the Court may wish to take note of the following statement, made by Mr. Miller in August (footnote continued on next page)

searches in the Weatherman investigation; the power to authorize individual searches was delegated to Felt and Miller, and they then proceeded to authorize individual searches without consulting Gray, the Attorney General or anyone outside the FBI. Based on these facts, and as shown below, it is clear that Felt's and Miller asserted "mistake" as to the legality of the searches charged in the Indictment is a pure mistake of law. The purported defense thus falls; "Such a mistake of law can be no defense". Ehrlichman, supra, 546 F.2d at 923.

If, as in Ehrlichman and Barker (hereafter "Barker-Martinez")[44] this case involved a single warrantless search authorized by Felt and Miller pursuant to the specific authorization of Gray, it might be argued that Felt and Miller had reasonably relied on Gray's apparent authority, in the belief that he had obtained the necessary prerequisite to the legalization of such a search: the personal authorization of the President or Attorney General (a Chief Executive warrant). In such a situation it would be possible that the President or Attorney General had "considered the requirements of national security and authorized [a physical search of a home] as reasonable". Katz v. United States, 389 U.S. 347, 364 (1967) (White, J., concurring). In this case, however, the situation is quite different. Felt and Miller do not allege that the President, the Attorney General, or even Gray ever gave specific authorization for any of the searches which they (Felt and Miller) admittedly authorized. The

43/ (footnote continued from last page)
1976 to a Time magazine reporter, concerning the alleged foreign involvement of the Weatherman:

> I wish I could tell you that the foreign ties of the Weathermen were a factor, but I can't. We looked into those connections and didn't find enough to justify the suspicion of espionage. My motivation in approving the break-ins was the bombings, the terrorism and my own desire to solve those cases.

Quoted in Time, May 1, 1978, p. 18

44/ United States v. Barker, 546 F.2d 940 (D.C., Cir. 1976).

most that can be alleged is an asserted belief on the part of Felt and Miller that the President or Attorney General had delegated to Gray, who in turn had delegated to Felt and Miller, the Chief Executive's power to authorize warrantless searches in national security contexts. Felt's and Miller's argument, therefore, is that by virtue of such perceived delegation, they believed that they possessed legal power to authorize warrantless searches in the Weatherman investigation. Such an argument flies in the face of over two hundred years of law relating to the enactment, interpretation, and enforcement of the Fourth Amendment.

It is abundantly clear that the Chief Executive's power to authorize a warrantless search in national security contexts rests solely with the President and with his alter ego for such matters, the Attorney General.[45/] The Court of Appeals for the District of Columbia has made clear in Ehrlichman, supra, 546 F.2d at 927, that this power may not be delegated:[46/]

> No court, Justice of the Supreme Court, or Presidential administration has ever suggested a power [to search without a warrant] which could be generally delegated, for example, even to regular intelligence agencies, like the FBI and CIA, let alone to the extrastatutory group involved in the instant case. Even though the employees and administrators of the regular agencies might have the background, training and departmental discipline to make responsible, expert decisions, the risk of their myopic abuse of such a powerful prerogative is simply too great to permit its delegation.

The longstanding prohibition against such delegation (either by the President or Attorney General of the power to determine the reasonableness of a national security search or by a court of the power to determine probable cause) is firmly rooted in the history

45/ Myers v. United States, 272 U.S. 52, 133 (1926).

46/ Indeed, even the far less awesome power to authorize the application to a court for a judicial warrant for electronic surveillance may not be delegated. United States v. Giordano, 416 U.S. 505 (1974); United States v. Chavez, 416 U.S. 562 (1974).

of the Fourth Amendment. That history makes abundantly clear that it was precisely such delegations of the right to search and seize, in the form of general warrants (in England) and writs of assistance (in the colonies), that provided the historical background of governmental abuse of power that the framers of the Fourth Amendment sought to preclude from our form of government.[47/] Government counsel intend no disrespect to the defendants in this case in asserting, as we do, that to countenance any legal theory that would permit the delegation to law enforcement officers like themselves of the awesome power to authorize the search of, and seizure from, the homes of private citizens would indeed to be place "the liberty of every man in the hands of every petty officer".[48/]

It is thus clear that Felt's and Miller's argument that they in fact had delegated to them legally effective power to authorize warrantless searches is without merit. What then of their assertion that they at least believed that such a delegation had occurred? The claim is equally unavailing: even if such a delegation had purportedly been made, their grossly mistaken belief in its legal validity would have been a pure mistake of law -- and "[s]uch a mistake of law can be no defense". Ehrlichman, supra, 546 F.2d at 923. See also Barker-Martinez, supra, 546 F.2d at 946; United States v. International Minerals & Chemical Corp., 402 U.S. 558, 563 (1971); Dennis v. United States, 171 F.2d 986, 990 (D.C. Cir. 1948), aff'd. 339 U.S. 162 (1950); Yellin v. United States, 374 U.S. 109, 123 (1963); Watkins v. United States, 354 U.S. 178, 208 (1957).

47/See generally, Lasson, The History and Development of the Fourth Amendment to the United States Constitution, 253-260. This history is also discussed in Keith, 407 U.S. 297, 316 (1972); Olmstead v. United States, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting); and Boyd v. United States, 116 U.S. 616, 625-630 (1886)

48/James Otis' argument in Lechmere's Case, quoted in Boyd v. United States, 116 U.S. 616, 625 (1886).

But Miller asserts[49] that a defense of the absence of mens rea, based upon an asserted good faith and reasonable reliance on apparent authority, is available to him under Barker-Martinez, supra. He is wrong, on several grounds. First, as has been demonstrated above, Miller's (and Felt's) asserted mistaken belief as to the legality of their actions is a pure mistake of law, which constitutes no defense (rather than a rare conjuction of mistake of fact with mistake of law, as was present and dispositive in Barker-Martinez, 546 F.2d at 946 and 954). Secondly, comparison of the facts of the two cases, as well as analysis of the policy considerations that led to reversal in Barker-Martinez, distinguishe the latter from the present case and demonstrates the unavailability to Felt and Miller here of any defense grounded upon Barker-Martinez. Whereas Felt and Miller, to derive solace from that case, would analogize themselves to the "foot soldiers" (Id. at 943) therein, the truer analogy is between themselves and Ehrlichman, who sought to rely upon generic authorization from President Nixon (Ehrlichman, supra, 546 F.2d at 925-927), just as defendants Felt and Miller now seek to rely upon generic authorization from defendant Gray. Such reliance should be no more available to Felt and Miller as a defense than it was to Ehrlichman.[50] Furthermore, the defense of "reasonable reliance on [Gray's] apparent authority" cannot be said, on the basis of Barker-Martinez, to be available to Felt and Miller, because they were hardly "citizen[s] . . .

49/Miller Memorandum, p. 9

50/It is interesting to note that the documentation of the fateful authorizations in the two cases are strikingly similar: Ehrlichman authorized the Fielding break-in with explicit warning that it not be "traceable back to the White House"; Felt and Miller authorized the various surreptitious entries involved here with explicit notation that "full security" had been assured -- the FBI euphemism for the assurance that the entry and search would be neither detected nor traced back to the FBI. What is more, the documentation in each of the two cases described the warrantless searches in euphemistic terms: as "a covert operation" (Ehrlichman) and as the "contact [of] an anonymous source" (Felt and Miller).

innocently drawn into illegal action at the behest, and on the authority, of a government official". Id. at 948, n. 24. The gap between the ability of Felt and Miller, on the one hand, and that of Gray, on the other hand, to judge the legality of warrantless searches, can hardly be analogized to "the [great] gap (both real and perceived) between a private citizen and a government official with regard to their ability and authority to judge the lawfulness of a particular governmental activity", Id. at 948-49 (Wilkey, J.). Indeed, if there was a "gap" at all, one must presume that Felt and Miller were the most capable assessors of the legality of a particular law enforcement technique 51/ Finally, any "mistake" assertedly made by Felt and Miller was not brought about by reliance upon a "conclusion or statement of law, . . . issued by an official [in contradistinction to the private citizen who relies] charged with interpretation, administration, and/or enforcement responsibilities in the relevant legal field." Id. at 955 (Merhige, J.). Almost all cases that have recognized an exception to the doctrine that mistake of law is no defense have done so on the basis of reliance by a private citizen on an (erroneous) statement of law by an "official" source 52/

Thus, the narrow Barker-Martinez exception to the general doctrine that mistake of law is no defense is of no aid to the defendants in the present case. We return then to the clear and pertinent holding of Ehrlichman, supra, 546 F.2d at 923, that a mistake of law such as that now asserted by Felt and Miller "can be no defense." Consequently, any request for discovery which

51/ As of late 1972, Felt and Miller had a combined total of some fifty-two years in the FBI; Gray had some eight months.

52/ See Pierson v. Ray, 386 U.S. 547 (1967) (statute later held unconstitutional); Cox v. Louisiana, 379 U.S. 559 (1965) (advice of Chief of Police to picketers); Raley v. Ohio, 360 U.S. 423 (1959) (advice of legislative Committee chairman to witness); United States v. Mancusco, 139 F.2d 90 (3d Cir. 1943) (judicial decision later overruled); People v. Ferguson, 134 Cal. 41, 24 F.2d 965 (1953) (erroneous advice of state corporation counsel); and State v. Davis, 63 Wisc. 2d 75, 216 N.W. 2d 31 (1974) (erroneous advice of county corporation counsel and assistant district attorney). Compare, United States v. Konovsky, 202 F.2d 721, 730 (7th Cir. 1953) (responsibilities of police officer with regard to superior orders).

seeks to support the reasonableness of such a mistake should be denied as irrelevant and immaterial to full and proper resolution of the case. See United States v. Ehrlichman, 376 F. Supp. 29, 35-36 (D.D.C. 1974) (Gesell, J.), aff'd. 546 F.2d 910 (D.C. Cir. 1976), rev'd on other grounds sub nom. United States v. Barker, 546 F.2d 940 (D.C. Cir. 1976). Accordingly, Gray discovery requests 38, 40, 41, 42 and 43, Felt request C-4 and F-8, and Miller requests 8 through 13 should be denied.

E. Limitations on the Scope of the Government's Voluntary Discovery Undertakings

There remains a problem of scope with respect to certain areas of the government's voluntary discovery undertakings. The defendants requested, during the early discovery discussions in this case, access to documentation of the possible existence of actual Presidential or Attorney General authorizations for the specific warrantless searches charged in the Indictment. If in fact such authorizations (i.e., valid Chief Executive warrants) existed, that might well constitute a defense to the charges in this case. Accordingly, the government agreed to provide discovery within the standard bounds materiality, relevant to the question of whether or not there was in fact any higher authorization for the warrantless searches here at issue.

In seeking discovery regarding this issue, beyond that which the government has voluntarily agreed to provide, defendants go too far. Defendant Miller's requests 15 and 16,[53/] for example, seek documentation not only of governmental plans to deal with the Weatherman Organization but also of plans to deal with "other terrorist groups"; Miller also seeks documentation of any communications (concerning any such plans) between the White House and

53/These requests are duplicative of, or closely analogous to, Gray requests 18, 28, 29, 30, 31, 32 and Felt requests C-5, D-3 through D-6.

the Department of Justice or the FBI. Governmental plans to deal with the Weatherman, and White House communications regarding same, could of course be material to the defense; thus, the government has voluntarily agreed to provide to the defense any FBI or Department of Justice documents manifesting plans to deal with the Weatherman, as well as any White House communications on that subject which are contained in FBI or Department of Justice files.[54/]

The government, however, opposes the production of such documentation with regard to "other terrorist groups". It is submitted that in order for a plan to be material in any way to the issue of authorization for warrantless searches in the FBI's Weatherman investigation, it would necessarily have to relate, directly or indirectly, to the Weatherman.[55/] The request for "plans to deal with...other terrorist groups" is a fishing expedition of no litigative relevance to this case, and should accordingly be denied.

Furthermore, defendant Miller seeks (request 15) any documentation of such plans prepared not only by the White House, the Department of Justice, or the FBI, but also by the Department of Defense, Central Intelligence Agency, Department of Treasury, Department of State, and the National Security Agency. Apart from any other objections, that aspect of the request is facially overbroad and should be denied on that ground alone. United States v. Haldeman, supra. The preparation of any such plans by such other agencies could not have affected the state of mind of

54/ White House files, it should be noted, are not in the "custody and control" of the government. See discussion supra, Part I(E).

55/ In opposing such discovery concerning "other terrorist groups", the government does not oppose discovery of, and will in fact voluntarily produce, documentation regarding any plans which deal with terrorist groups (or with groups otherwise described, e.g., "radical" groups) if the designation or contents can be fairly read as intended to be inclusive of the Weatherman.

the defendants unless they were transmitted to the FBI; the government has voluntarily agreed, as part of its undertaking to make available all FBI Weatherman files, to provide to the defense any such documentation transmitted to the FBI concerning the Weatherman. But discovery of documents prepared by those other agencies and not transmitted to the FBI should be denied.

Similarly, a number of the discovery requests explicitly or implicitly call for the production of information from law enforcement and intelligence agencies (domestic or foreign) other than the FBI. Such information is provided to the FBI (and other law enforcement and intelligence agencies) pursuant to an understanding, referred to as the "third agency rule", that is well known throughout the FBI (and therefore to the defendants). The "rule" provides that when an agency, such as the FBI, receives intelligence information from any outside agency, domestic or foreign, it cannot disclose that information to anyone external to itself without the consent of the originating agency. Under the "rule", therefore, the Department of Justice (which of course includes the FBI) cannot disclose to the defendants any intelligence information originally obtained from another intelligence or law enforcement agency, domestic or foreign, without the prior consent of that agency. Should any particular discovery ruling by this Court require that such a consent be obtained, government counsel would do everything in their power to do so. However, the Court should be aware that such consent is rarely forthcoming from domestic agencies and even more rarely available from foreign agencies. Accordingly, were the Court to order discovery to the defendants of certain intelligence information originating from agencies, domestic or foreign, external to the FBI, the Department of Justice might ultimately be required to move to dismiss this prosecution. It is respectfully requested that that

fact be considered by the Court in assessing the bona fides of those discovery requests which call, explicitly or implicitly, for access to such information.

CONCLUSION

For the reasons cited herein and in the accompanying Response to defendants' discovery motions, as well as for any additional reasons that may be advanced at the hearing on this matter, the government respectfully submits that the defendants' discovery requests, beyond the many to which the government has voluntarily agreed, should be denied.

Respectfully submitted,

The United States of America

By: Barnet D. Skolnik
Barnet D. Skolnik
Special Counsel
United States Department of Justice

Francis J. Martin
Attorney
United States Department of Justice

Breckinridge L. Willcox
Attorney
United States Department of Justice

Of Counsel:

Daniel S. Friedman
Daniel S. Friedman
Attorney
United States Department of Justice

Ira C. Pollack
Attorney
United States Department of Justice

Greenberg/Gray-2408

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing MEMORANDUM was hand-delivered, this 15th day of June, 1978, to Alan I Baron, Esquire, Frank Berstein, Conaway and Goldman, 1300 Mercantile Bank & Trust Building, 2 Hopkins Plaza, Baltimore, Maryland, defense counsel for Gray; Brian Gettings, Esquire, 1400 N. Uhle Street, Courthouse Square, Arlington, Virginia, defense counsel for Felt; and Thomas a Kennelly, Esquire, Diuguid, Siegel & Kennelly, 1000 Connecticut Avenue, N.W., Washington, D.C., defense counsel for Miller.

FRANCIS J. MARTIN

OPTIONAL FORM NO. 10
JULY 1973 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

Assoc. Dir.
Dep. AD Adm.
Dep. AD Inv.
Asst. Dir.:
Adm. Servs.
Crim. Inv.
Ident.
Intell.
Laboratory
Legal Coun.
Plan. & Insp.
Rec. Mgnt.
Tech. Servs.
Training
Public Affs. Off.
Telephone Rm.
Director's Sec'y
FBI/DOJ

TO : John J. McDermott
Deputy Associate Director
Federal Bureau of Investigation

DATE: June

FROM : Francis J. Martin
Trial Attorney
Criminal Division

SUBJECT: United States v. Gray, et al

In your memorandum of June 5, 1978 you stated tha various reasons it appeared that an August 23, 1971 me by Egil Krogh might be material to the defense in United States v. Gray, et al, and accordingly should be reviewed for possible disclosure as part of the government's informal discovery undertakings. Your memorandum indicated that this Krogh memorandum had been forwarded to then Associate Deputy Attorney General James A. Wilderotter. You also forwarded an April 15, 1974 airtel which reflected the delivery of Krogh's files to Wilderotter and also showed an inventory which listed the Krogh memorandum. At or about the time of your memorandum I discussed this matter with either S.A. [redacted] or S.A. [redacted] and informed him that the Krogh memorandum, in all likelyhood, was now in the Archives as part of the files of my former office, the Watergate Special Prosecution Force, and that I would obtain the memorandum as soon as the government's response to discovery motions had been completed and filed. Enclosed is a copy of the Krogh memorandum which I obtained yesterday from the Archives.

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b7C

REC-110 62-118045-41

Also enclosed is a copy of Mr. Miller's reply memorandum on the issue of pre-indictment delay filed June 20, 1978. In that memorandum (p.2-4) counsel for Miller states that he was informed by FBI agents handling discovery that "20% to 40%" of the materials seized on August 19, 1976 had been destroyed and that the Krogh memorandum had "disappeared." I have discussed this matter with S.A. [redacted] who assures me that no one working on discovery made any such direct statement, although obviously some inadvertent statements along these lines must have been made. It is almost inevitable that in any undertaking as complex as the present discovery process some mistakes will be made. However, it must always be kept in mind that any inaccurate or premature representations as to the state or existence of files or documents and/or the contents of the files can have a severe impact on a most important commodity in this case, i.e., the government's [redacted]

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14 AUG 31 1978

1 ENCLOSURE

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credibility and good faith in the eyes of the Court.

I will also discuss this matter with counsel for Mr. Miller in order that he fully understand that it is only S.A. [redacted] or S.A. [redacted] who can make any representations as to the files and that, other than as to strictly routine matters, those representations can only be made, in any official sense, after consultation with government counsel.

THE WHITE HOUSE

WASHINGTON

August 23, 1971

MEMORANDUM FOR THE PRESIDENT'S FILE

SUBJECT: Presidential Meeting with the Attorney General, Director Hoover, and Messrs. Ehrlichman & Krogh, May 26, 1971

The President met with Attorney General Mitchell, Director Hoover, John Ehrlichman, and Bud Krogh on Wednesday, May 26, 1971, at 4 p.m. in the President's office in the Executive Office Building.

The President said the meeting was occasioned by the recent rash of police slayings and asked Director Hoover to report on the current situation. The Director reviewed the number of police slayings so far this year, concentrating especially on the most recent ones in the District of Columbia and New York City. He reported that to the best of his knowledge this was not indicative of a national conspiracy (although there was a lot of talk by Black Panthers and other militant groups to kill police, they didn't plot out individual killings in a conspiratorial fashion). The Director also detailed the extent of FBI help already offered to the Police Departments affected.

There followed a discussion of the plausibility of making police killing a Federal offense. Bud Krogh reported on the pending legislation before Congress which would make this a Federal offense and pointed out that several policemen's benevolent organizations were also calling for it. Director Hoover indicated that he was opposed to Federalizing police killing in that it would make the FBI into a national police force -- something he has opposed since taking office. The Director also pointed out that 94.6% of police killings are solved by local police within thirty days of the offense. The Attorney General added that there was a great deal of personalized response at the local level which was not only intent on catching police killers, but also might resent FBI control of a case. He also pointed out that under the Presidential Directive dated November 5, 1970, the FBI stands ready to put some of its investigative resources at the disposal of the police if requested.

62-118045-41

ENCLOSURE

The President said he would rather not have legislation which Federalized police killing, but wanted to do something for the police departments if possible, and especially to do something for the widows and children of slain policemen.

Director Hoover suggested the FBI could conduct a two-day course or seminar on police killings. It could examine the modus operandi, and compare notes on what were the best responses in these situations. Director Hoover said he could invite approximately 100 people from across the country and get a good cross section here for the seminar. The President said he would like to address the class if it could be worked out.

The President also asked the Director if there was any further assistance the FBI could render in cases of police killing. The Director responded that he could put his investigative field personnel at the disposal of state or local police in cases of police killings if requested by the state or local police department. The Attorney General agreed that this would be a good idea if the President would expand his previous Directive to include field personnel. The President agreed to do this.

The President said he felt it important for the Federal Government to pay the widow and children of slain policemen some direct payment which would tide them over during the hardship period. There was some discussion as to what other ideas had previously been submitted in this area -- especially the question of life insurance for policemen. There was also some discussion as how to properly limit it to just policemen rather than to other organizational groups. The President directed Bud Krogh to draft legislation which would provide for a direct payment to the widow and children of any policemen slain in the line of duty.

The President inquired as to the best way to indicate his concern and to properly develop these Federal aids to policemen. The Attorney General indicated that the International Association of Chiefs of Police had been trying to see the President for some time and that the National Sheriffs Association was another excellent organization. The President decided to meet with representatives of these two groups as well as a scattering

of big-city Chiefs of Police (Jerry Wilson of the District of Columbia was specifically included at the request of the President). The President asked that a meeting be set up with himself, the Attorney General, and Director Hoover as soon as possible. He asked Director Hoover to handle the invitations, and to meet with the group beforehand to explain some of the Presidential initiatives and ask them to oppose the Federalizing of police killing.

The meeting adjourned at approximately 5:30 p.m.

Bud Krogh

UNITED STATES GOVERNMENT

Memorandum

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

Assoc. Dir. _____
Dep. AD Adm. _____
Dep. AD Inv. _____
Asst. Dir.:
Adm. Servs. _____
Crim. Inv. _____
Ident. _____
Intell. _____
Laboratory _____
Legal Coun. _____
Plan. & Insp. _____
Rec. Mgnt. _____
Tech. Servs. _____
Training _____
Public Affs. Off. _____
Telephone Rm. _____
Director's Sec'y _____

TO : Mr. Bassett

DATE: 6-26-78

FROM : P. V. Daly

SUBJECT: RESPONSE TO DEFENSE REQUEST FOR DISCOVERY IN U. S. vs. L. PARTICK GRAY III, ET AL

PURPOSE: To report the release of three employees to their former units and the gain of one employee for temporary assignment.

DETAILS: As of June 26, 1978, the following people will return to their former units:

[redacted] b6 b7C

The following employee is a replacement for [redacted] b6 b7C

[redacted] b6 b7C

RECOMMENDATION: None, for information

APPROVED:

Director _____
Assoc. Dir. _____
Dep. AD Adm. _____
Dep. AD Inv. _____
Adm. Serv. _____
Crim. Inv. _____
Ident. _____
Intell. _____
Laboratory _____
Legal Coun. _____
Plan. & Insp. _____
Rec Mgnt. _____
Tech. Servs. _____
Training _____
Public Affs. Off. _____

REC-110 62-118045-4/2

14 AUG 31 1978

Greenberg/Gray-2415

1 - Finance and Personnel
1 - Mr. Bassett
1 - Mr. Daly

JLT:dmd

8 SEP 14 1978

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

FBI/DOJ

UNITED STATES GOVERNMENT

Memorandum

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

Assoc. Dir.
Dep. AD Adm.
Dep. AD Inv.
Asst. Dir.:
Adm. Servs.
Crim. Inv.
Ident.
Intell.
Laboratory
Legal Coun.
Plan. & Insp.
Rec. Mgnt.
Tech. Servs.
Training
Public Affs. Off.
Telephone Rm.
Director's Sec'y

TO : Mr. Bassett

DATE: 6-21-78

FROM : J. L. Tierney

SUBJECT: U. S. vs. L. PATRICK GRAY III, ET AL
ARTICLE IN "THE WASHINGTON POST"
DESTRUCTION OF SEIZED MATERIALS

PURPOSE: To set forth background and current status of destruction of materials reported in today's edition of "The Washington Post."

DETAILS: 1. BACKGROUND: During August 1976, 22 cabinets of materials were seized at FBIHQ by personnel assigned to Mr. Long under the direction of the Department of Justice's Task Force. According to personnel who handled these files for Mr. Long, the cabinets were inventoried, noting the caption of each folder in the cabinet but not outlining the content of the folders. Approximately three weeks after the seizure, instructions were received from the Department to return most of the materials to the locations from which they had been seized, primarily in the IS-2 Section of the Intelligence Division. The cabinets which were not returned cannot be identified now with finality. Mr. Gardner was warned by Mr. Long's personnel when he ordered the return of most of the cabinets that once returned, it would be difficult to retrieve and impossible to account for the material. Approximately one month later, instructions were received from the Department to retrieve 232 of the returned folders. The folders to be retrieved were specified by the Department by making notations on a copy of the original topical inventory. At that time, 185 of the folders were retrieved. Some folders could not be located. Other folders were acknowledged to have been destroyed. Mr. Robert L. Shackelford, former Section Chief of IS-2, acknowledged he had destroyed the 11 folders which the Department desired to retrieve from the materials originally seized from and returned to him.

2. DISCOVERY: During informal discovery, defendant W. Mark Felt requested "...all items seized from the offices of the FBI in Washington, D. C. and New York City on or about

Enclosure

ENCLOSURE

2 ENCLOSURE

1 - Mr. McDermott
1 - Mr. Long
1 - Mr. Boynton
1 - Mr. Bassett
1 - Mr. Daly
1 - Mr. Tierney

REC-110 62-118045-43

AUG 31 1978

(CONTINUED - OVER)

JLT:dmd

4 - PVD

84 SEP 14 1978

FBI/DOJ

b6
b7C

August 19, 1976." The Department responded, "This material, to the extent it is relevant to the Weatherman investigation and is still available, will be provided."

By memorandum dated May 25, 1978, the Department's prosecution team noted it had agreed to make the above documents available and instructed they be processed. The Department commented as follows: "Also, as you know, after its initial seizure, certain materials were returned to IS-2, where they were later destroyed. An effort should be made, based on inventories or any other available data source, to determine, as well as possible, what materials were destroyed."

In the prosecution response to the defense's formal motions for discovery inspection, served June 15, 1978, the Department states, "The requested accounting of all retrieved documents lost or destroyed since the time the Government became aware of the alleged facts resulting in this indictment will be provided."

The inventory of the seized material, both that retrieved and that still in the hands of FBIHQ offices to which it was returned, has been in progress for over one week. It is being accomplished by the support employee who originally maintained these records for Mr. Long. The inventory has located approximately one-half dozen additional folders which could not be retrieved in 1976. The inventory will not be complete until at least Friday, June 23, 1978. We cannot now estimate how many folders are missing and will never know how much of the content of existing folders may be missing.

3. NEWS ARTICLE: A copy of the article, quoting the "Los Angeles Times," in "The Washington Post" is attached. It is apparently based on a review of defendant Miller's recently filed reply to the Government's response. It quotes Miller's attorney as stating he was "informally advised" that 40 percent of the seized material has been destroyed. The fact that some materials had been destroyed was discussed with Thomas B. Kennelly, attorney for Mr. Miller. No figure was given for the extent of the destruction since no figure was known. I contacted SA [redacted] by telephone this morning; and he concurs with my recollection that, although destruction was discussed, no figures were given.

RECOMMENDATION: None, for information.

APPROVED:
Director
Asso. Dir.
Dep. AD Adm.
Dep. AD Inv.
Asst. Dir.:
Crim. Inv.
Ident.
Intell.
Laboratory
Legal Coun.
Off. Cong. & Pub. Aff.

HMD

Greenberg/Gray-2417

Some Break-In Case Evidence Reportedly Destroyed by FBI

By Ronald J. Ostrow
Los Angeles Times

Potentially crucial evidence in the FBI break-in case was destroyed by the FBI after it had been turned over to the agency by Justice Department prosecutors, court records disclosed yesterday.

The lawyer for former assistant director Edward S. Miller, one of three ex-FBI officials indicted in the case, said that up to 40 percent of the material originally seized by investigators at FBI offices in Washington and New York had been destroyed.

Miller's attorney, Thomas B. Kennelly, said he had been "informally advised" of the evidence destruction by FBI agents, but had been given no explanation as yet for the action.

He cited the destruction of the evidence in arguing that the case against Miller should be dismissed.

Miller made the disclosure in papers filed with the U.S. District Court here.

Other sources familiar with the case said the destroyed records were "ticklers"— in FBI parlance, copies of documents—that bore handwritten notations that could have been read to indicate that break-ins had been committed. The existence of such evidence would help the defense in its efforts to show that break-ins were a relatively commonplace tactic well-known throughout the FBI.

It could not be learned why the Justice Department prosecutors returned such potential evidence to the FBI before it was used in court.

The material was destroyed under FBI rules that require the destruction of "ticklers" after periods ranging from 30 days to six months, according to the knowledgeable sources.

An FBI spokesman would not comment on the disclosure and Terrence B. Adamson, the Justice Department's director of public information, said: "We'll have to answer that in court."

Miller, former acting FBI director L. Patrick Gray III and W. Mark Felt, No. 2 man under Gray, were indicted April 10 on charges of ordering the FBI break-ins to try to track down fugitive members of the Weatherman terrorist organization. Kennelly said he could not specify the nature of the destroyed records other than to note that they "related directly to the matters alleged" in the indictment.

DO-7

FROM

OFFICE OF DIRECTOR, FEDERAL BUREAU OF INVESTIGATION

TO

OFFICIAL INDICATED BELOW

MR. ADAMS	( )
MR. MCDERMOTT	( )
MR. BASSETT	(✓)
MR. COCHRAN	( )
MR. COLWELL	( )
MR. CREGAR	( )
MR. JOSEPH	( )
MR. KELLEHER	( )
MR. KENT	( )
MR. LONG	( )
MR. MINTZ	( )
MR. MOORE	( )
MR. BOYNTON	( )
MR. BRUEMMER	( )
MR. HOTIS	( )
TELE. ROOM	( )
MISS DEVINE	( )
	( )
	( )
	( )

SEE ME	( )
NOTE AND RETURN	(✓)
PREPARE REPLY	( )
SEND MEMO TO ATTORNEY GENERAL	( )
FOR YOUR RECOMMENDATION	( )
WHAT ARE THE FACTS?	( )
HOLD	( )

REMARKS: Please confirm that FBI is not communicating ~~in~~ any manner with defense counsel & that ¶ 3 refers to D.J. communication.

FBI/DOJ

Greenberg/Gray-2419

62-118045-43

ENCLOSURE

UNITED STATES GOVERNMENT

Memorandum

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

Dir. ____
Dep. AD Adm. ____
Dep. AD Inv. ____
Asst. Dir.:
Adm. Servs. ____
Crim. Inv. ____
Ident. ____
Intell. ____
Laboratory ____
Legal Coun. ____
Plan. & Insp. ____
Rec. Mgnt. ____
Tech. Servs. ____
Training ____
Public Affs. Off. ____
Telephone Rm. ____
Director's Sec'y ____

TO : MR. MCDERMOTT

DATE: 6/28/78

FROM : H. N. Bassett HNB

SUBJECT: U.S. vs. L. PATRICK GRAY III, ET AL
MATERIALS SEIZED IN 1976
MISQUOTES BY DEFENSE COUNSEL

PURPOSE:

By memorandum from SA [redacted] to me of 6/21/78 (attached), information was set forth concerning defense claims that they were "informally advised" that 40 percent of the records seized during the inquiry by the Department of surreptitious entries had been destroyed. Concerning the memorandum, the Director asked, "Please confirm that FBI is not communicating 'injudiciously' with defense counsel and that Paragraph 3 refers to D.J. communication." Purpose of this memorandum is to answer the Director's questions and to furnish additional information relative to captioned matter. b6 b7C

DETAILS:

As you may recall, captioned matter was discussed at some length during the Executives' Conference of 6/22/78 and it is believed that some of the Director's concerns concerning this situation were answered at that time. Nevertheless, I have discussed the situation with SAs [redacted] and [redacted] (the latter returning from annual leave on Monday, 6/26/78) who are in charge of the discovery as it applies to the Bureau's responsibilities. They assured me that they have been completely judicious in their dealings with Mr. Miller's attorneys Kennelly and Epstein. They have advised that their comments have been restricted to issues arising out of records being reviewed such as the existence of related documents in FBI files or the files of other Government agencies. In fact, they have pointed out that the Department, by letter dated 5/25/78 b6 b7C

Enclosure
1 ENCLOSURE handled as separate serial
1 - Mr. McDermott
1 - [redacted] b6 b7C

HNB:jam
(4)

REC-110

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AUG 31 1978

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FBI/DOJ

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to all three defense counsel, advised the counsel to arrange for review of disclosure materials at FBI Headquarters by contacting SAs [redacted] and [redacted] who "...will be available to assist you should you have any questions concerning these files." As a matter of information, Kennelly and Epstein b6 b7C are the only two attorneys who have come into Bureau space for the purpose of reviewing and discussing pertinent documents. There is a room set aside for them as was the case when we were handling discovery proceedings for [redacted] and attorneys working for Edward Bennett Williams utilized this same room. They have no authority to wander about our space and are restricted to this room.

Assuming the second part of the Director's question relates to the news article that Miller's attorney had been informally advised that 40 percent of the seized material had been destroyed, we do not know exactly how Miller's attorney came to that conclusion. However, the actual motion filed by the attorney indicates that he obtained this information from the FBI Agents handling discovery proceedings. In the actual motion, the figure of 20 to 40 percent was used as opposed to the news article which indicated that 40 percent had been destroyed. Both SAs [redacted] and [redacted] have advised me that at no time did they tell Miller's attorney that 20 to 40 percent of the questioned b6 b7C documents had been destroyed. (As noted in referenced memorandum, the Department had notified defense counsel some documents had been destroyed.) As a matter of fact, as referenced memorandum would indicate, there is no way we could ever determine what was destroyed since only the folders seized by the Department were inventoried, but the contents of the individual folders were not. It is SA [redacted] recollection that at the time of Kennelly's inquiry, he may well have told him that 20 to 40 percent of the folders were unaccounted for, which at the time was an accurate statement but never did he advise that this amount of material had been destroyed.

Departmental Attorney Francis J. Martin, who has handled most of the contacts with the Bureau and with defense counsel on discovery material, on behalf of Departmental Prosecutor Barnet D. Skolnik, telephonically contacted SA b6 [redacted] following the news item and was initially upset in what b7C appeared to be uncoordinated and uncontrolled disclosures to the defense during the discovery. However, as the facts

H. N. Bassett to Mr. McDermott Memorandum
Re: U.S. vs. L. Patrick Gray III, Et Al
Materials Seized in 1976
Misquotes by Defense Counsel

were related to Martin, he appeared satisfied that we had not exceeded our authority in dealing with defense counsel and considered Kennelly's actions to be within the bounds permitted an aggressive defense counsel seeking support for his position in a pre-trial discovery motion. When it was pointed out to Martin that this whole problem developed because of the persistence of William L. Gardner, Chief of the Criminal Section, Civil Rights Division, in returing the seized files which caused the loss of accountability Martin commented, "Everybody makes mistakes."

Both SAs [redacted] and [redacted] have initialed this memorandum attesting to the accuracy of the information contained herein.

RECOMMENDATION:

For information.

APPROVED:
Director
Assoc. Dir.
Dep. AD Adm.
Dep. AD Inv.
Adm. Serv.
Crim. Inv.
Ident.
Intell.
Laboratory
Legal Coun.
Plan. & Insp.
Rec. Mgnt.
Tech. Servs.
Training
Public Affs. Off.

UNITED STATES GOVERNMENT

Memorandum

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

Assoc. Dir. ____
Dep. AD Adm. ____
Dep. AD Inv. ____
Asst. Dir.:
Adm. Servs. ____
Crim. Inv. ____
Ident. ____
Intell. ____
Laboratory ____
Legal Coun. ____
Plan. & Insp. ____
Rec. Mgnt. ____
Tech. Servs. ____
Training ____
Public Affs. Off. ____
Telephone Rm. ____
Director's Sec'y ____

TO : Mr. Bassett

DATE: 6-29-78

FROM : A. P. V. Daly

SUBJECT: RESPONSE TO DEFENSE REQUEST FOR DISCOVERY IN U. S. vs. L. PATRICK GRAY III, ET AL

PURPOSE: To report the release of one employee to his former unit and the gain of one employee for temporary assignment.

DETAILS: As of June 29, 1978, [redacted] will return to his former unit and [redacted] will report for temporary assignment.

b6
b7C

RECOMMENDATION: None, for information.

APPROVED:

Director ____
Assoc. Dir. ____
Dep. AD Adm. ____
Dep. AD Inv. ____
Adm. Serv. ____
Crim. Inv. ____
Ident. ____
Intell. ____
Laboratory ____
Legal Coun. ____
Plan. & Insp. ____
Rec Mgnt. ____
Tech. Servs. ____
Training ____
Public Affs. Off. ____

REC-110 62-118045

AUG 31 1978

1 - Finance and Personnel
2 - Mr. Bassett
1 - Mr. Bresson
1 - Mr. Ramey
1 - [redacted]

b6
b7C

JLT:dmd
(5)

Greenberg/Gray-2423

SEP 14 1978

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FEDERAL BUREAU OF INVESTIGATION
FOIPA
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Page 73 ~ b3, b6, b7C
Page 74 ~ b3, b6, b7C
Page 75 ~ b6, b7C
Page 76 ~ b3, b6, b7C